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Supreme Court, U.S.
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In The

Supreme Court of the United States

GAILE OWENS,

Petitioner,

vs.

JEWELL STEELE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET
QUESTIONS PRESENTED

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), the state may not in a criminal case suppress favorable or exculpatory evidence that is "material" in that, but for its suppression, there is a reasonable probability that the result at sentencing would have been different. *Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769 (2009). This case presents the following *Brady* questions:

1. When a federal court has found that the state suppressed exculpatory evidence (here, explicit handwritten evidence of the deceased husband's extra-marital sexual trysts) that could mitigate punishment in a domestic homicide case, may the federal court nevertheless find the suppressed evidence not "material" because the defendant suspected or had some knowledge of the deceased's philandering?

2. Does the Sixth Circuit panel majority's *Brady* rule, *i.e.*, that if a defendant has knowledge (or a suspicion) of any fact, she is not entitled to exculpatory, documentary evidence regarding that fact, directly conflict with this Court's black-letter law on materiality set forth in *Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769 (2009) (reversing Sixth Circuit) and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gaile Owens respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The divided opinion of the Sixth Circuit Court of Appeals (Pet. App. 1-72) is reported at 549 F.3d 399. The opinion of the Sixth Circuit Court of Appeals denying rehearing *en banc* (Pet. App. 212-213) is unreported. The memorandum order of the district court (Pet. App. 73-197) is unreported. The order denying Ms. Owens's Motion to Alter or Amend (Pet. App. 198-211) is unreported.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on December 9, 2008. Pet. App. 1-72. The order denying Petitioner's timely petition for rehearing *en banc* was entered on February 25, 2009. Pet. App. 212-213. Justice Stevens granted Ms. Owens's application for an extension of time to file a petition for writ of certiorari until July 25, 2009, a Saturday. The petition is accordingly due on the next business day, July 27, 2009. *See* S. Ct. R. 30. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. Amend. XIV: "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Section 2254 of Title 28 of the United States Code states in relevant part:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Procedural History

Gaile Owens was convicted of accessory before the fact to first degree murder and was sentenced to death in Memphis, Tennessee, on January 15, 1986. The Tennessee Supreme Court affirmed. *State v. Porterfield and Owens*, 746 S.W.2d 441 (Tenn. 1988). She sought post-conviction relief in state court, the denial of which was affirmed. *Owens v. State,* 13 S.W.3d 742 (Tenn. Crim. App. 1999).

Petitioner sought habeas corpus relief in the United States District Court for the Western District of Tennessee, which was denied. Pet. App. 73-197. The United States Court of Appeals for the Sixth Circuit affirmed in a split decision. Pet. App. 1-72.

B. Facts Relevant to Question Presented

1. It Is Taken as a Given that the Very Same Prosecutor Who Withheld Exculpatory Evidence in *Cone v. Bell*, 129 S.Ct. 1769 (2009), Also Withheld Exculpatory Evidence (of the Victim's Infidelity) in This Case[1]

Gaile Owens hired Sidney Porterfield to kill her husband, Ron Owens. When she was arrested for this

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[1] Shelby County Assistant District Attorney General (ADAG) Don Strother withheld exculpatory evidence in Gary Cone's case and in Petitioner's case. *See Cone*, ___ U.S. ___, 129 S.Ct. 1769; *Bell v. Cone*, 2002 WL433359, United States Supreme Court Briefs, Reply Brief of Petitioner, p. *15.

crime, she told the police that her husband had long been cruel to her and that they had a bad marriage. Pet. App. 23. She also believed that her husband had had multiple affairs during their marriage and, shortly before the crime, she caught him in a compromised position with his associate Gayla Scott, who Gaile Owens thought (correctly, as it turns out) was one of his lovers. After years of "[Ron] Owens's cruel and sadistic behavior toward" her,[2] and shortly after Ron's parking lot tryst with Scott, Ms. Owens committed her crime. No evidence about Ron Owens's behavior was introduced at the guilt/innocence phase or at sentencing. Ms. Owens was convicted and sentenced to death, and that judgment was affirmed on appeal. *Owens*, 746 S.W.2d 441.[3]

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[2] Pet. App. 55 (Merritt, J., dissenting). During a pre-trial competency evaluation, Ms. Owens reported that her marriage had been especially unhappy because her husband was verbally abusive, humiliated her sexually, and carried on extramarital affairs. CA6 J.A. 275. Defense counsel advised the court before trial that in his opinion "This case has a meritorious defense in the battered-wife syndrome." CA6 J.A. 120.

[3] Before trial, ADAG Strother offered Ms. Owens and Mr. Porterfield a plea agreement. The offer, which had been approved by the decedent's father, required both Ms. Owens and Mr. Porterfield (who Ms. Owens barely knew) to plead guilty to first degree murder in exchange for a sentence of life in prison. CA6 J.A. 137. Ms. Owens accepted the offer. CA6 J.A. 134. Mr. Porterfield refused. CA6 J.A. 137. As a result, ADAG Strother withdrew the offer. *Id.*

a. Graphic ("Flufflicker"), Handwritten, Explicit, Exculpatory Letters, Proving the Victim's Affairs, Were Suppressed at Trial and, If the Prosecutor Was Telling the Truth, Never Existed

When police searched the victim's home and office, they found

> sexually explicit letters between Mr. Owens and one of his girlfriends, Gayla Scott. In the love letters, the two called each other "flufflicker" and "lollipop," a clear reference to numerous sexual experiences between [Ron] Owens and Gayla Scott.[4]

This is the same Gayla Scott from the parking lot tryst. These love/sex letters, and a police report about them, were not disclosed to defense counsel at trial, despite a specific defense request.

Given the "longstanding, commonsense belief in our culture that people who kill their spouses because of infidelity are not as culpable as other murderers,"[5] defense counsel at trial asked whether the state had collected any evidence of the victim's infidelity. CA6 J.A. 101-102. Counsel wrote that there was "good reason to believe that the deceased husband of the defendant had numerous girlfriends" which he "flaunted . . . with such regularity and in such ways as to contribute to [Ms. Owens's] state of mind" and

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[4] Pet. App. 56-57 (Merritt, J., dissenting).

[5] Pet. App. 36 (Majority Opinion).

that "proof of such is material to issues of guilt and punishment." Counsel averred that

> there was a search of the entire house of the deceased after the defendant was in custody; his personal possessions at his office were inventoried **and seized**. . . . Counsel believes that at the house or office were found numerous items that would verify the above allegations including, but not limited to, names, addresses, **correspondence to and from "lovers"** which would be of great benefit to the defense.

Id. (emphasis added).

The trial court held a hearing on the motion. ADAG Strother avowed to the trial court that "**we have shown them every single scintilla of evidence which we have seized and which we have that came from the house. Anything that is in the possession of any law enforcement agency we have and we have shown to counsel for the defense.**" CA6 J.A. 111 (emphasis added). When defense counsel continued to press on the existence of sexually explicit letters, ADAG Strother reiterated to the trial court that the State had complied with its obligations under *Brady*:

> Everything we have in the way of any kind of piece of physical evidence, any piece of paper, any notebook, any – anything along those lines, **letters** and etcetera that we have, we have made available to them.

CA6 J.A. 115-A (emphasis added). Ms. Owens's counsel replied, "Well I certainly accept that. I've got no reason not to." *Id.* When counsel then asked if ADAG Strother could produce an inventory of the items seized, the trial court asked, "Do you have an inventory of the office, Mr. Strother?" *id.*, and ADAG Strother replied, "Not that I am aware of, Your Honor." *Id.*[6]

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[6] The State's theory was that Ms. Owens killed her husband for insurance money. There was literally no evidence to support that theory. In closing argument, the prosecutor stated:

> If it takes the execution of ten Sidney Porterfields [sic] and Marsha Gaile Owens [sic], who would cooly and deliberately plot and design the death of a Ronald Owens . . . if it takes ten of their deaths in the electric chair to make only one potential Sidney Porterfield or Marsha Gaile Owens say, "No, I will not kill that **innocent man**, because I might get electricuted [sic] for it," it's worth it.

T. Tr. 1941-1942, CA6 J.A. 165 (emphasis added). Because the State suppressed evidence, the sentencers never heard that Mr. Owens was not, in fact, an entirely innocent man, that Ms. Owens was humiliated by, and ashamed of, her husband's infidelity, and that it was her husband's ribald philandering, and not some phantom life insurance policy, that motivated Ms. Owens.

b. The Existence of the Exculpatory Love/ Sex Letters and a Police Report Was Revealed to Defense Counsel During State Post-conviction Proceedings

During post-conviction proceedings, and pursuant to Tennessee Public Records Act requests,[7] a police report detailing the search of Ron Owens's home and office, and the discovery of the sexually explicit love letters, was finally disclosed. The letters were "juvenilistic love notes" in which, again, the two referred to each other by their pet names, "Fluff," "Flufflicker," and "Lollipop." CA6 J.A. 412. The police report revealed that when police confronted Ms. Scott about the notes and letters she admitted the affair, but claimed it had ended years earlier. CA6 J.A. 263.

Detective Wray testified during the state post-conviction proceedings that thereafter, and prior to trial, Ms. Scott asked that the love/sex letters be returned to her. Detective Wray told the post-conviction court that he telephoned one of the lawyers for the State to get permission to give the love/sex letters back to Ms. Scott. While Detective Wray was not sure which prosecuting attorney he talked to, he was clear that it was one of the prosecutors involved in the Gaile

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[7] The letters could not have been discovered at trial through a public records act request. *See Capital Case Resource Center, Inc. v. Woodall*, 1992 WL12217 (Tenn. App. 1992) (establishing access to police and prosecution files in state post-conviction); Tenn.R.Crim.P. 16(n)(2) (police files are not subject to disclosure in pre-trial discovery).

Owens case: "To the best of my memory it was General Strother. It may have been a city prosecutor, George McCrary. Or it could have been Mr. Challen, I believe was involved in the – I'm sorry. I just don't remember who it was." CA6 J.A. 413. Detective Wray was clear that either ADAG Strother, ADAG Challen, or City Attorney McCrary told him that *the love/sex letters were not relevant to the case* and to give them back to Ms. Scott. CA6 J.A. 412. Detective Wray complied.

c. The State Post-conviction Courts Held the Love/Sex Letters Were Not Suppressed and Were Not Exculpatory

In her state post-conviction petition, Ms. Owens alleged that her rights under *Brady* were violated *vis-a-vis* her capital sentence.[8] Ms. Owens argued that the report and sexually explicit letters were mitigating evidence because people who commit murder because of a spouse's infidelity are generally believed to be less culpable than many others who commit murder. The post-conviction court denied relief finding first that the State did not suppress the evidence because it was not in the possession of the State's attorneys and second that Ms. Owens was not

[8] Ms. Owens did not challenge her conviction for accessory before the fact to first degree murder in state post-conviction or in federal habeas proceedings.

prejudiced because she knew of her husband's affair with Gayla Scott. CA6 J.A. 246.

On appeal, the Tennessee Court of Criminal Appeals first wrote that because Ms. Owens knew about or suspected that her husband was having an affair, and because her attorneys filed a motion seeking exculpatory evidence of affairs, the State had no "duty" to provide the sexually explicit letters. *Owens,* 13 S.W.3d at 758 ("The duty upon the State under *Brady* does not extend to information already in the possession of the defense or that they are able to obtain or to information not in possession or control of the prosecution."). The Court also wrote that the explicit letters were not exculpatory because "this evidence may have provided the appellant with a motive to kill her husband." *Owens*, 13 S.W.3d at 758-759.

d. The Circuit Court Judges Agreed that The Sexually Explicit Love Letters Should Have Been Disclosed

Petitioner filed a federal habeas corpus petition that included this *Brady* claim. CA6 J.A. 30-31. The district court dismissed Ms. Owens's *Brady* claim, finding that Ms. Owens was not prejudiced by the State's withholding of the love letters because she could have called Gayla Scott to testify. Pet. App. 135.

The Circuit Court affirmed in a 2-1 decision. The lower court majority described the three components of a *Brady* claim, *i.e.*, the evidence at issue must be

favorable to the accused, it must have been suppressed by the state, and prejudice must have ensued. Pet. App. 34. Prejudice is shown when there is "a reasonable probability that there would have been a different result had the evidence been disclosed." *Id.*

The majority agreed that the love/sex letters were covered by *Brady* and should have been disclosed to the defense:

> When Owens filed her request, the prosecution told the court that it had turned over "everything we have in the way of physical evidence." While this may have been technically true because the prosecutors never handled the letters, it was not true for purposes of *Brady*. *Brady*'s disclosure requirement includes not just information in the prosecutor's files, but "information in the possession of the law enforcement agency investigating the offense." *Jamison v. Collins*, 291 F.3d 380, 395 (6th Cir. 2002). These letters were at one time in police possession, but whether by accident or on purpose, those letters were never shown to Owens.

Pet. App. 35-36.[9] The majority found that the State court's conclusion that the letters "were not favorable evidence . . . is questionable," and then "assum[ed] that the letters contained favorable information and

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[9] The majority "assume[d] that the police still had the letters when Owens filed her [*Brady*] request." Pet. App. 38, n. 7.

reject[ed] her claim on the ground that she suffered no prejudice." Pet. App. 36-37.

2. The Panel Below Split on *Brady* Materiality

a. The Majority Rule on *Brady* Materiality: When a Defendant Could Have Offered Other Evidence in Support of a Fact or Defense at Trial, It Cannot Be Prejudicial for the State to Have Withheld Additional Evidence, Even if the Withheld Evidence Is Stronger Evidence of that Fact or Defense

The lower court majority did not analyze the record in this case and determine what effect, if any, the suppressed evidence might have had if it had been disclosed. Instead, the majority pointed to *other* evidence that Owens could have presented to show her husband was a philanderer.

> Owens knew that Ronald was having an affair with Scott. Her brief attempts to transmute that "knowledge" into a mere "suspicion." (Petr.'s Br. At 66). This is a futile task, because her own habeas petition admits that "she [Owens] received an [anonymous] letter made up of words cut out of a magazine telling her that everyone but Ms. Owens knew that Mr. Owens was having an affair with Ms. Scott." The petition also relates an incident where Owens caught Scott and Ronald together in a parking lot, and Ronald reacted in a hostile manner when

> so confronted. Owens's petition also claims that this very incident of catching them together prompted Owens to hire the hit-man. Owens knew of the affair, and if she wanted to present evidence of the affair, she could have testified, produced the anonymous letter, or subpoenaed Scott.

Pet. App. 37-38. Without comparing the probative value of the suppressed graphic love letters with the probative value of the "proof" that was "available elsewhere" (*i.e.*, Ms. Owens's own testimony about witnessing the parking lot tryst), the majority simply wrote: "she . . . loses." Pet. App. 38.[10]

b. The Dissent: "The majority's proposed rule is nonsense."

Judge Merritt dissented. He agreed that there was suppression of exculpatory evidence and further noted that ADAG Strother's misrepresentations and "falsehoods" were "typical of the conduct of the Memphis district attorney's office during this period. *See Cone v. Bell*, 492 F.3d 743, 759 (6th Cir. 2007) (Merritt, J., dissenting), *cert. granted*, ___ U.S. ___,

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[10] After rejecting the state court's finding on the first two elements of a *Brady* claim (*i.e.*, after finding that the evidence *was* suppressed and *was* exculpatory), and having denied relief on a wholly different basis than the state court had, the panel majority inexplicably wrote that it was bound by "AEDPA deference" under 28 U.S.C. § 2254(d)(1). "Perhaps we would have ruled differently on Owens's *Brady* claim if we were the state court, but we are not the state court." Pet. App. 40.

128 S.Ct 2961, 171 L.Ed2d 883, 76 U.S.L.W. 3484 (2008)." Pet. App. 57.[11]

With respect to materiality and prejudice, Judge Merritt observed that "[m]y colleagues state their proposed rule as follows: 'Owens knew of the affair, and if she wanted to present evidence of the affair, she could have testified . . . She loses because the proof she needed was available elsewhere.'" Pet. App. 58. Judge Merritt dismissed this rule out-of-hand: "The majority's proposed rule is nonsense." *Id.*

Judge Merritt observed that the majority rule was directly contrary to *Brady, i.e.*: "if a defendant has knowledge of any fact, or a reasonable suspicion of a fact, the defendant is not entitled to exculpatory evidence regarding that fact because she could testify regarding that fact herself." Pet. App. 57-58. Judge Merritt explained that taken to its logical conclusion, Mr. Brady himself would have lost – "Brady had knowledge that he did not kill the victim, but had no documentary evidence to support that knowledge or to support his view of the identity of the real culprit." Pet. App. 58. Judge Merritt wrote that "according to the rule announced by my colleagues, Brady should have taken the stand and testified about his

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[11] As this Court is aware, Judge Merritt's dissenting view of the *Brady* claim in *Cone v. Bell* was ultimately validated by this Court's decision. *See Cone*, 129 S.Ct. at 1784 ("In sum, both the quantity and the quality of the suppressed evidence lends support to Cone's position . . . that the State's arguments to the contrary were false and misleading.").

knowledge or put the real culprit on the stand and examined him. This argument is directly contrary to *Brady*." *Id.*

Judge Merritt concluded that the "blatant prosecutorial misconduct" was material and prejudicial:

> The prosecution offered Owens life imprisonment (conditioned on the guilty plea of her confederate) because the killing under these mitigating circumstances – circumstances the jury never heard about at all – made her less culpable. The jury never heard the evidence in the hand of the prosecution that made her less culpable because the prosecution consciously and deliberately covered it up. And now my colleagues say, "fine, no problem, she should have taken the stand."
>
> Rather than tell the jury the truth about the matter, the prosecution told the jury that she killed her husband to get "insurance money."

Pet. App. 58-59.

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S "NONSENSE" RULE OF MATERIALITY IS SQUARELY AT ODDS WITH THIS COURT'S NATIONAL RULES UNDER *BRADY V. MARYLAND*, *KYLES V. WHITLEY*, AND *CONE V. BELL*

When the State "withholds from a criminal defendant evidence that is material to [her] guilt or

punishment, it violates [her] right to due process of law in violation of the Fourteenth Amendment." *Cone*, 129 S.Ct. at 1782. A *Brady* violation occurs when (1) favorable evidence (2) is suppressed which (3) is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963). Evidence is material if there is a reasonable probability that the result at guilt/innocence or sentencing would have been different absent its suppression. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985).

Mr. Cone would have lost in this Court last Term under the "nonsense"[12] majority decision applied in this case. Petitioner asks that this Court grant the petition and either summarily reverse the lower court majority or set the case for briefing and argument.

A. Contrary to This Court's Rulings, the Lower Court Majority, as a Matter of Law, Eschewed an Examination of the Existing Record and the Impact of Suppression on That Record

This case presents a lower court's majority opinion at odds with this Court's materiality test for *Brady* violations.[13] As this Court reiterated in *Cone* and explained in *Bagley*:

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[12] As Judge Merritt wrote in the dissent below, "The majority's proposed rule is nonsense." Pet. App. 58.

[13] The lower court majority did not dispute that the first two elements of a *Brady* violation – suppression, and favorable

(Continued on following page)

> evidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Cone, 129 S.Ct. at 1783, *quoting Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383. To assess materiality, a court must examine the suppressed evidence and meticulously compare it to the trial evidence from the standpoint of relative persuasive impact. *Kyles v. Whitley*, 514 U.S. 419, 441-454, 115 S.Ct. 1555, 1569 (1995).

In Petitioner's case, rather than "review[ing] the record to ensure that the prosecution's blatant and repeated violations of a well-settled constitutional obligation did not deprive petitioner of a fair trial,"

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evidence – were plainly established by the record. The police report and sexually explicit love letters withheld by the State here were unquestionably favorable because they provided Ms. Owens with a motive that minimized her culpability based upon the "longstanding commonsense belief in our culture that people who kill their spouses because of infidelity are not as morally culpable as other murderers." Pet. App. 36. In the face of a direct and explicit request for love letters, ADAG Strother stood in open court and claimed that he had disclosed absolutely "everything which we have seized" – "every single scintilla." CA6 J.A. 111. Then, this same ADAG capitalized on the suppression of the evidence by arguing to the jury that Ms. Owens's only motive was to collect insurance money because she was "just plain no-good" and had an "innocent man" killed. Tr. 1941, CA6 J.A. 165.

Kyles, 514 U.S. at 455 (Stevens, J., joined by Ginsburg, J., and Breyer, J., concurring), the majority below ignored what happened at trial and instead focused not on what Petitioner purportedly *could* have done at trial, but upon what she supposedly chose *not* to do.[14] The proper focus is on *what happened* at trial, given the suppression, *and what could have happened*, without the suppression. The defense presented no evidence of the victim's infidelity at trial or sentencing. Ms. Owens believed that her husband was unfaithful. Defense counsel asked for any proof the State had of infidelity and were told there was none.[15]

Flufflicker. Lollipop. What would the defense have done with this proof? What would the sentencers have thought if they learned that the defendant had her husband killed and that her husband had been having oral sex with Ms. Scott? Rather than

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[14] For example, the panel majority found that the State's deliberate suppression of favorable evidence was not material because (1) Gaile Owens could have testified that she suspected Ron was cheating on her; (2) Ms. Owens could have produced the "anonymous letter" constructed from pieces of newspaper telling her that Ron Owens was sleeping with Gayla Scott; or (3) Ms. Owens could have subpoenaed Gayla Scott to testify about the affair. Petitioner discusses in sub-section C, *infra*, how out-of-touch with actual trial practice these alternatives are.

[15] State representations have consequences. "In reliance on this misleading representation [about the non-existence of evidence], the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise might have pursued." *Bagley*, 373 U.S. at 682, 105 S.Ct. at 3391.

being a greedy, no-good, insurance proceeds-seeker, who killed an "innocent" man "in the prime of his life," as the prosecutor was able to argue, Ms. Owens could have been accurately viewed as a classic, jealous, long-suffering wife betrayed and humiliated by her husband, the "Flufflicker." CA6 J.A. 165, 412. There is a reasonable probability that just one juror would find in this ribald philandering a basis for a sentence less than death. *See Wiggins v. Smith*, 539 U.S. 510, 537, 123 S.Ct. 2527, 2543 (2003) ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."); Tenn. Code Ann. § 39-2-203(h) (Michie 1982) (one juror's vote for life results in a life sentence).

Letters in hand, the penalty phase defense could have been markedly different and the State would have been deprived of its "insurance money" theory. No longer able to contend that Mr. Owens was an "innocent man," the State would have had to concede that Mr. Owens had been a philanderer. Armed with the letters, the defense could have been emboldened to call Ms. Scott as a witness. Had Ms. Owens chosen to testify, she would have been insulated on cross-examination because she would have had powerfully persuasive proof that her husband was cheating on her and rubbing her nose in it.

Not only did the State deprive Ms. Owens of the best evidence of her husband's misbehavior, they affirmatively misled her lawyers about whether or

not the affair even happened. The lawyers filed their discovery request for the letters based on what they had heard had been recovered. When ADAG Strother stridently denied that such evidence had ever been seized, the lawyers were left to conclude that the rumors of the affair were just that – rumors. The letters were the best evidence of the affair and could have been introduced in mitigation on their own. *See* Tenn. Code Ann. § 39-2-203(c) (Michie 1982) (**any** evidence tending to establish a mitigating factor admissible).

B. The Lower Court Majority's Rule that "*Brady* does not apply when the information is available from another source," Is an Unprecedented and Indefensible Curtailment of *Brady*

Kyles and *Cone* reject the lower court's legal analysis. In *Kyles*, this Court found a *Brady* violation even though Kyles's attorneys had knowledge of the withheld information at the time of trial, and **it was available from another source**. This Court explained that, even though the *information* was available from another source, Kyles's due process rights were still violated because the *withheld evidence* at issue would (1) have strengthened the defense theory, and (2) made that theory more believable to a jury. *Kyles*, 514 U.S. at 449, n. 19. This Court found "because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested." *Id.*, 514

U.S. at 429. Here, "exposure to [Gayla Scott's] own words, even through cross-examination of the police officers, would have made the defense's case more plausible and reduced its vulnerability to credibility attack." *Id.*, 514 U.S. at 449, n. 19. The fact that in *Kyles* "information . . . [supporting a defense theory was] available from another source" did not preclude the finding of a *Brady* violation. Rather, it was because prosecutors withheld evidence which would have powerfully bolstered the "information . . . available from another source" and supported Kyles's defense theory that this Court found a *Brady* violation.

And, in *Cone*, the defendant presented an insanity defense based in part on evidence that he was a drug user, having become hooked on drugs while serving his country in Vietnam. Cone presented voluminous testimony to support his insanity defense, but the State (ADAG Strother in fact) withheld evidence which would have bolstered the defense. This Court found that the withheld evidence relating to Mr. Cone's drug use "strengthened the inference that Cone was impaired by his use of drugs around the time the crime was committed," *Cone*, 129 S.Ct. at 1783, even though Cone knew he was a drug addict.

Quite a contrary conclusion would have been reached in *Cone* were the *Owens* Sixth Circuit panel majority in charge. According to the panel majority's rationale, Gary Cone would not be entitled to any evidence relating to his drug use because he knew he was a drug user and could have testified himself about his drug use. However, as this Court

recognized, Mr. Cone's own statements about his drug use would not be as persuasive as the reports of independent witnesses who verified that Mr. Cone appeared to be on drugs at the time of the crime. As a result, this Court remanded Mr. Cone's case to the district court for a determination of materiality as to sentence because it found that "both the quantity and the quality of the suppressed evidence lends support to Cone's position at trial that he habitually used excessive amounts of drugs, that his addiction affected his behavior during his crime spree, and that the State's arguments to the contrary were false and misleading." *Cone*, 129 S.Ct. at 1784.

The State's deliberate withholding from Gaile Owens is indistinguishable from that in *Kyles* and *Cone*. Capital and other defendants in the Sixth Circuit are treated differently than defendants throughout the country on this crucial issue. Petitioner asks this Court to again, as it had to do in *Cone*, reverse the Sixth Circuit's purported application of *Brady*.[16]

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[16] The lower court majority found that the state court's ruling on this *Brady* claim was dubious to the degree that the state courts found that the love letters and police report were not exculpatory. Petitioner agrees, and contends that the state court's findings that the letters and report were not favorable to the defense were contrary to and an unreasonable application of *Brady* (*see* 28 U.S.C. § 2254 (d)), as discussed in text above. The state court also held that there was no *Brady* violation because the defense already knew of the victim's affairs and so there was no state obligation to disclose "Flufflicker." *Owens*, 13 S.W.3d at 758. Petitioner contends that this state court finding is also

(Continued on following page)

C. The Lower Court's Majority Holding Is at Odds With the Reality of Criminal Trials

The panel majority found that the State's deliberate suppression of favorable evidence was not material because (1) Gaile Owens could have testified that she suspected Ron was cheating on her; (2) Ms. Owens could have produced an "anonymous letter" constructed from pieces of newspaper telling her that Ron Owens was sleeping with Gayla Scott; or (3) Ms. Owens could have subpoenaed Gayla Scott to testify about the affair. These suggestions have no grounding in the reality of criminal trials.

First, the Fifth Amendment protects criminal defendants from being forced to testify. A criminal defendant cannot be forced to abandon his or her constitutional rights under the Fifth Amendment and thereby relieve the State from its due process obligations.[17] Moreover, the experienced prosecutor

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contrary to and an unreasonable application of *Brady*, as discussed in text above.

In addition, because the lower court found (or should have found) that the state court decision did not present a limitation on granting federal habeas corpus relief, *de novo* review of Petitioner's claim is required. Under *de novo* review, "[p]erhaps we would have ruled differently on Owens's *Brady* claim if we were the state court, but we are not the state court." Pet. App. 40.

[17] As Judge Merritt explained, under the majority's rationale: "Brady [himself] was not entitled to documentary evidence in the hands of the prosecution that would support any knowledge Brady already had," and instead "Brady should have taken

(Continued on following page)

during cross-examination could simply say "where's the proof?"

Second, the panel majority ignores the fact that the withheld, explicit, sex-laced love letters and police report would have blunted any State effort to challenge at trial a defense assertion of the deceased's philandering ways and its impact on Petitioner's mental state. Other proof – (1) the anonymous letter, (2) testimony by Ms. Owens that she believed her husband was having an affair, or (3) putting Gayla Scott ("Fluff") on the stand without any way to prove the affair or to impeach her testimony (and without any knowledge that Ms. Scott had admitted the affair to police)[18] (Pet. App. 37-38) – pales by comparison to "*Flufflicker*."

Just as in *Kyles*, "exposure to [Gayla Scott's] own words, even through cross-examination of the police officers, would have made the defense's case more plausible and reduced its vulnerability to credibility attack." *Id.*, 514 U.S. at 449, n. 19. And as this Court has recently reiterated in *Cone*, "[T]he documents suppressed by the State vary in kind, but they share a common feature: Each **strengthens** the inference that [Gaile Owens was motivated to hire someone to

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the stand and testified about his knowledge or put the real culprit on the stand." Pet. App. 58.

[18] It bears remembering that Ms. Scott requested, and received, the return of the love letters, at least intimating her desire to hide her relationship with Ron Owens.

kill her husband not because of a life insurance policy but because of her husband's infidelity]." *Id.*, 129 S.Ct. at 1783.

As Judge Merritt points out, the State knew that this case was mitigated by Ron Owens's flagrant infidelity. Pet. App. 58. That is why they offered Ms. Owens a sentence of life in prison. This Court should grant certiorari to enforce the clear principles of *Brady, Kyles,* and *Cone* which have been eviscerated by the Sixth Circuit panel majority in this case. The lower court majority conflicts with the decisions from this Court, and its decision brings the relevant Supreme Court precedents into confusing collision with one another.

CONCLUSION

This Court should grant the petition for writ of certiorari and either (1) vacate the judgment and remand for further proceedings; or (2) reverse the judgment below.

Respectfully submitted,

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549 F.3d 399

United States Court of Appeals,
Sixth Circuit.
Gaile K. OWENS, Petitioner-Appellant,
v.
Earline GUIDA, Warden, Respondent-Appellee.
No. 05-6105.

Argued: Jan. 29, 2008.
Decided and Filed: Dec. 9, 2008.
Rehearing and Rehearing En Banc
Denied Feb. 25, 2009.*

ARGUED: Gretchen L. Swift, Federal Public Defender's Office, Nashville, Tennessee, for Appellant. Gordon W. Smith, Office of the Attorney General, Nashville, Tennessee, for Appellee. **ON BRIEF:** Gretchen L. Swift, Christopher M. Minton, Federal Public Defender's Office, Nashville, Tennessee, for Appellant. Gordon W. Smith, Office of the Attorney General, Nashville, Tennessee, for Appellee.

Before: BOGGS, Chief Judge; and MERRITT and SILER, Circuit Judges.

BOGGS, C.J., delivered the opinion of the court, in which SILER, J., joined. MERRITT, J. (pp. 424-31), delivered a separate dissenting opinion.

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* Judge Merritt would grant rehearing for the reasons stated in his dissent.

OPINION

BOGGS, Chief Judge.

Gaile K. Owens ("Owens") is on Tennessee's death row because she hired Sidney Porterfield to kill her husband and Porterfield successfully carried out his assignment. Owens appeals the district court's dismissal of her petition for a writ of habeas corpus. She argues that: 1) she received ineffective assistance of counsel ("IAC") when trial counsel failed to adequately investigate her background and failed to overcome the state's hearsay objection to one of her penalty-phase witnesses; 2) the state violated *Brady v. Maryland* by failing to turn over letters between her deceased husband and his paramour; and 3) the trial court unconstitutionally prevented her from offering, as mitigating evidence, testimony that she wanted to plead guilty in return for receiving a life sentence.

We reject the first argument and hold that the Tennessee courts reasonably applied *Strickland v. Washington* by concluding that Owens sabotaged her own defense and that counsel's performance is not deficient when counsel follows a client's instructions. Likewise, we reject her second argument and hold that the Tennessee courts reasonably applied *Brady* because even if the letters were favorable evidence, and were suppressed by the state, Owens was not prejudiced because she could have presented other evidence of the affair but chose not to do so. Finally, we reject her third argument and hold that the

Tennessee courts reasonably applied *Lockett v. Ohio* in refusing to admit Owens's evidence because no court, let alone the Supreme Court, has held that failed plea negotiations may be admitted at a penalty-phase hearing. Therefore, we affirm.

I

In early 1985, Owens solicited several men to kill her husband, Ronald Owens. Evidence at her trial, as detailed in *State v. Porterfield,* 746 S.W.2d 441 (Tenn.1988), showed that she met with one of the would-be hitmen, Sidney Porterfield, at least three times. Ronald Owens was found in the family's den on February 17, 1985, with his skull smashed from at least 21 blows from a tire iron. He had been beaten with so much force that fragments of his skull had been driven into his brain and his face had been driven into the floor. Blood was splattered over the walls and floor. A pathologist's report showed extensive injuries to his hands, indicating that he had been trying to cover his head with his hands during the savage attack.

After Ronald Owens's corpse was discovered, George James, one of the other men solicited by Owens, feared that he might be a murder suspect and went to the police. James agreed to wear a wire and meet with Owens. At the meeting, Owens explained that she had her husband killed because of "bad marital problems" and paid James $60 to keep quiet. Police listened from a nearby car and arrested Owens

immediately and Porterfield soon afterwards. Owens ultimately confessed to hiring, and Porterfield to committing, the murder. Porterfield stated that Owens offered him $17,000 to murder her husband, and also that he went to Owens's house about 9:00 pm on the night of the murder, ambushed Ronald Owens in the backyard, and then fought with him until they ended up inside where Porterfield beat Ronald Owens to death. Gaile Owens explained to the police that she had Ronald killed because "we've just had a bad marriage over the years, and I just felt like he had been cruel to me. There was very little physical violence."

Prior to trial, the prosecution offered both defendants a life sentence in return for a guilty plea, contingent on both of them accepting the plea. Owens accepted, but Porterfield refused, so the offer was withdrawn and the pair were tried jointly for first-degree murder. Neither defendant testified at trial. At trial, Owens's counsel's theory was that Owens had withdrawn her murder solicitation and that Porterfield murdered Ronald in a botched burglary. The prosecution introduced both Porterfield's and Owens's confessions, as well as testimony that Porterfield and Owens were seen talking together the day of the murder. Porterfield introduced no evidence in his defense, while Owens introduced testimony from a neighbor who said that Owens was hysterical after her husband's body was found. The jury convicted both Owens and Porterfield of first-degree murder.

During the penalty phase, Owens offered testimony from Dr. Max West, a psychiatrist who said

that he had treated her in 1978 for severe behavior problems and from two jail employees who said that she was a model prisoner. The jury found Owens guilty of two aggravating circumstances, murder-for-hire and a murder that was "especially heinous, atrocious, or cruel." It also found Porterfield guilty of three aggravating circumstances, and sentenced both parties to death. The defendants took a joint but unsuccessful appeal to the Tennessee Supreme Court. After that, both parties continued to appeal, but through different avenues.[1]

Owens then unsuccessfully sought state post-conviction relief. In 2000, she filed a federal habeas petition in the Western District of Tennessee, raising 26 claims. The petition addressed only her death sentence; it explicitly admitted that she hired Porterfield to murder her husband. The district court denied the petition in a 118-page opinion issued on June 15, 2005, and later denied Owens's motion to amend the judgment. The court then granted Owens a limited certificate of appealability (COA). From Claim 1, penalty-phase IAC, the district court certified Subclaim 1(a), for failure to investigate mitigating evidence, and Subclaim 1(c), for failure to overcome the

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[1] Porterfield, unlike Owens, unsuccessfully sought certiorari from the United States Supreme Court. *Porterfield v. Tennessee,* 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988) (denying certiorari). He currently has an appeal pending before a different panel of this court. *See Porterfield v. Bell,* 258 F.3d 484. The case has been stayed while Porterfield exhausts his *Atkins* claim in state court.

state's hearsay objections. The district court also certified Claim 2, for a *Brady* violation. This court expanded the COA to include a third claim, that the trial court unconstitutionally prevented Owens from presenting evidence that she had accepted the prosecution's plea offer.

II

We review the district court's decision de novo. *Slagle v. Bagley,* 457 F.3d 501, 513 (6th Cir.2006). Owens filed her federal petition after the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). AEDPA's familiar standards therefore apply. *Lindh v. Murphy,* 521 U.S. 320, 327, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

Under AEDPA, a state court's factual findings are presumed correct and must be accepted unless the petitioner rebuts them with clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *McAdoo v. Elo,* 365 F.3d 487, 493-94 (6th Cir.2004). Our review of the state court's legal conclusions is also deferential. AEDPA permits us to grant a state prisoner's habeas petition only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) . . . [was] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A state-court decision is contrary to clearly established federal law "if the state court arrives at a conclusion that is opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *(Terry) Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state-court decision unreasonably applies federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Ibid.* As Justice O'Connor explained in *Williams,* the term "unreasonable application" may be difficult to define, *id.* at 410, 120 S.Ct. 1495, but the standard is deferential because

> Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 411, 120 S.Ct. 1495. Elsewhere, the Supreme Court has held that "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 127

S.Ct. 1933, 1939, 167 L.Ed.2d 836 (2007). "[C]learly established federal law" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams,* 529 U.S. at 412, 120 S.Ct. 1495. "AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.' "*Schriro,* 127 S.Ct. at 1939-40. Ultimately, AEDPA's highly deferential standard requires that this court give the state-court decision "the benefit of the doubt." *Slagle,* 457 F.3d at 514 (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam)).

III

Owens's habeas petition divided her IAC claim into three parts. She argued in Subclaim 1(a) that trial counsel was ineffective in failing to investigate her background properly, and in Subclaim 1(c) that counsel was ineffective in failing to overcome the state's hearsay objection to the testimony of Dr. West, one of her proffered mitigation witnesses. Both subclaims are before us on appeal. Owens also seeks to argue Subclaim 1(b) from her habeas petition, that counsel should have obtained an independent mental health evaluation. (Petr.'s Br. 55-57). This issue has not been certified for appeal and will not be considered.

A

The relevant "clearly established federal law" is *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show IAC, Owens "must show that counsel's performance was deficient," and that "the deficient performance prejudiced the defense." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. "[D]eficient performance" means that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. To establish prejudice, Owens must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. In the context of a death sentence, the question of prejudice turns on "whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052.

Strickland emphasized that

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it

> has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 689, 104 S.Ct. 2052 (internal citation deleted). Justice O'Connor's discussion in *Strickland* recognized another fact that is particularly relevant to this case. She explained that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," and "[i]n particular, what investigation decisions are reasonable depends critically" on what the defendant does. *Id.* at 691, 104 S.Ct. 2052.

Our court has previously vacated death sentences when the defendant's counsel failed to investigate adequately the defendant's background for mitigating evidence. *See generally Poindexter v. Mitchell,* 454 F.3d 564, 577-78 (6th Cir.2006) (collecting cases). Failure to perform *any* investigation into the background of the defendant when that investigation would have revealed extensive mitigating evidence is constitutionally deficient. *Wiggins v. Smith,* 539 U.S. 510, 523-28, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). However, contrary to Owens's assertion, a limited investigation is not per se ineffective. A limited investigation is reasonable if counsel could reasonably

have concluded that additional investigation would be of little use. *Wiggins,* 539 U.S. at 525, 123 S.Ct. 2527. Furthermore, "[n]either *Wiggins* nor *Strickland* addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." *Schriro,* 127 S.Ct. at 1942.

Schriro addressed the situation where a client thwarted his attorneys' efforts to present mitigating evidence, and it held that the defendant's "established recalcitrance" and persistent "undermining" of counsel's efforts defeated his ineffective assistance claim. *Id.* at 1941-42. *Schriro* mirrors cases from our own circuit that have held that a client who interferes with her attorney's attempts to present mitigating evidence cannot then claim prejudice based on the attorney's failure to present that evidence. *See, e.g., Lorraine v. Coyle,* 291 F.3d 416, 435 (6th Cir.2002); *Coleman v. Mitchell,* 244 F.3d 533, 545 (6th Cir.2001) ("An attorney's conduct is not deficient simply for following his client's instructions.").

B

Before turning to the specifics of Owens's claim, we pause to make three points about the unusual state of the evidence in this case. Owens focuses on mitigating evidence that exists now, but this is looking through the wrong end of the telescope. The question is not what evidence she would use if her mitigation hearing took place today, but what evidence was available to her trial counsel when her

trial took place. The record shows that much of the evidence Owens now presents could not have been presented to the state court no matter what her trial counsel would have done.

1. Owens Hamstrung Her Own Attorneys

Owens foreclosed her attorneys from pursuing the best sources of mitigating evidence. First, contrary to counsel's advice, she refused to testify at either the guilt phase or the penalty phase of her trial. *See* J.A. 156-57, 387. Her counsel explained that he "tried," "wanted" and even "had to" get her to testify given the strength of the evidence against her in order to win the jury's sympathy. *Id.* at 387, 401-03. Nevertheless, she refused. Therefore, any evidence that Owens had could not have been presented directly to the jury and her attorneys could not have pursued any defense that relied on Owens's personal testimony or her demeanor before the jury.

Second, Owens refused to cooperate when her attorneys moved for an independent mental health examination because they believed that they might be able to raise a battered-wife-syndrome defense. J.A. 202-03 (state post-conviction ruling). The state court ordered Owens to be evaluated by state physicians and stated that if the examination showed cause, it would then order funds and an independent evaluation. *Ibid.* Experts from the Midtown Mental Health Center examined Owens *three times*. Each time Owens answered a few preliminary questions and

then refused to speak further. During the post-conviction hearing, one of her attorneys testified that "I'm sure that I told her to cooperate" because "we needed the mental evaluation." J.A. 373. Her non-cooperation[2] deprived counsel of any evidence, or leads to evidence, that a complete mental evaluation could have produced. *Cf. Lorraine,* 291 F.3d at 435 (counsel who arranged for psychological tests not ineffective when capital defendant refused to cooperate with doctors).

Third, Owens refused to let her attorneys interview her family members or call them to testify on her behalf. The state post-conviction court found this to be a fact. J.A. 214. Therefore, we must accept this fact unless Owens can refute it with "clear and convincing evidence." *Schriro,* 127 S.Ct. at 1939-40. She cannot. Owens's sister Carolyn Hensley testified at the state post-conviction hearing that Owens told her that Owens had ordered her counsel "not to involve [the family] in any way" with the trial. J.A. 623. Hensley added that neither she nor the other

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[2] Owens implies that trial counsel were too incompetent to obtain an independent mental health examiner (even though this issue is not officially certified for appeal), because they somehow failed to follow the proper procedures and she further implies that but for this incompetence, an independent examination would have taken place. The record shows that the blame falls on Owens's own shoulders. Trial counsel asked for funds. J.A. 201-03. The trial judge agreed to grant them if a state examination showed enough evidence to warrant further investigation. *Ibid.* Trial counsel then arranged three separate examinations, but Owens did not cooperate. *Ibid.*

members of the family would have wanted to testify even if they had been asked.[3] *Id.* at 625, 627-28. By contrast, her trial counsel testified only that she "might" have wanted him to speak with "her grandfather or mother or father." *Id.* at 395-96. It was reasonable for the state court to accept the clear testimony of Owens's sister on this matter and find that Owens refused to allow the involvement of her family. Therefore, any information known to the family members, and any information that would have been gathered based on leads provided by Owens's family members, could not have been presented at trial regardless of what Owens's trial counsel did.

Owens, of course, was constitutionally entitled to impose these limits on her attorneys. But she cannot then claim that her attorneys were "ineffective" for taking her advice. In order to prove that she was *prejudiced* by her *trial counsel's* failure to investigate her background, she must show not just that trial counsel could have discovered mitigating information, but that the information could have been discovered and credibly presented without: 1) Owens testifying at trial; 2); Owens undergoing additional mental health testing; 3) or counsel interviewing Owens's family.

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[3] Indeed, when Hensley testified at the post-conviction hearing, Hensley complained about the "pressing and pressing" and the "whole guilt maneuvering thing" that Owens's post-conviction attorneys used when they called Hensley and other family members and asked them to testify on Owens's behalf.

2. Owens's Trial Counsel's Timesheets Are Not Controlling

James Marty and Bret Stein[4] represented Owens at trial. Marty had served as counsel in four prior capital cases and was appointed seven months before trial. Their time sheets say that they spent only two hours on "pretrial investigation." Although Owens's certified IAC claim is based on the facts counsel failed to investigate, rather than the time they spent investigating, she uses these time sheets to create a perception that counsel were ineffective do-nothings. But this impression is neither legally controlling or factually accurate.

As to the law, the amount of time trial counsel spent preparing for trial is neither before us nor dispositive. *See, e.g., Hopkinson v. Shillinger,* 866 F.2d 1185, 1217 (10th Cir.1989) (defendant must show specific errors, and cannot prevail because of limited time attorney spent on case) (citing *United States v. Cronic,* 466 U.S. 648, 666, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)), *overruled on other grounds by Sawyer v. Smith,* 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). As to the facts, Marty testified at the state post-conviction hearing that "the time sheets were always 'way short of the time' he actually spent working on the cases" and that he had interviewed

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[4] Originally, Wayne Emmons was Marty's co-counsel, but a month before the trial, Emmons withdrew and was replaced by Stein.

several witnesses but could not remember the content of their testimony. Marty's fuzzy memory is understandable given that more than ten years passed between the trial and the post-conviction hearing. Nevertheless, his testimony on this point is credible, given that he located Dr. West, a psychiatrist whom Owens had seen once seven years earlier, scheduled three unsuccessful interviews between Owens and the State's mental health professionals, and that Owens's restraints on his investigation left him with little on which to spend his time. Entries in his timesheets for multiple interviews with Owens and for filing motions with the court confirm that he did not neglect his pretrial responsibilities. Stein testified that his case file had been burned in an office fire and thus he could not remember or prove what he had done. Put simply, it is almost certain that Owens's trial counsel spent more than two hours on pretrial investigation, and even if they did, this fact alone does not entitle Owens to relief no matter how often she repeats it.

3. Much of Owens's Evidence is Irrelevant To This Appeal

The district court reviewed Owens's claims "only to the extent and form in which they were presented to the state courts." As the state points out, this was correct because considering new facts for the first time in federal court would render AEDPA meaningless because a state court could not apply federal law to facts it never saw. Owens includes evidence outside

the state-court record in her appeal, but this evidence should, and will, be ignored.

Furthermore, Owens's method of presenting her evidence complicates how we view the record. At her post-conviction hearing, she did not present evidence of mitigation, and then call an independent mental health professional to explain the evidence's meaning. Instead, she introduced most of her mitigating evidence though her mental health expert, "traumatologist" Eric Gentry, whose services were paid for by the state during the post-conviction proceedings. Therefore, much of Owens's evidence is part of the record only because Gentry summarized the information in his testimony.

Yet when Owens presented her petition to the district court, her IAC claim included Subclaim 1(b), that counsel were ineffective for not obtaining an independent mental health expert. This claim was rejected and it has not been certified for appeal, so it should not be considered. *Hill v. Mitchell,* 400 F.3d 308, 335 (6th Cir.2005). This ruling impacts the way we view Owens's evidence that is only part of the record because Gentry recounted it second-hand. It is logically inconsistent to say that we may not consider trial counsel's ineffectiveness in not obtaining funds for a mental health expert, but we may look at the evidence such an expert could have presented, if only counsel have been effective enough to get the money to hire him. It is also logically inconsistent, when asking what trial counsel should have done, to rely on evidence from an interview with a mental health

counselor given in preparation for the post-conviction hearing when Owens was interviewed three times by mental health professionals before her trial but refused to cooperate despite being advised to do so by her attorneys. Owens must affirmatively prove that she was prejudiced. So, when arguing that certain evidence should have been presented, Owens must show that it *could have been presented without the aid of a state-funded mental health expert.* She cannot do this by pointing to evidence that is only part of the record because it was introduced through a state-funded mental health expert.

Furthermore, even if we consider the evidence presented through Gentry, the state court and the district court correctly determined that Gentry is not credible. His qualifications are dubious, his sources suspicious, and his testimony subject to contradiction. Gentry had a "Masters in Counseling" degree (the record is not clear from where), but he is not a medical doctor, and at the time he testified, he had no license in any discipline and had not published. His claimed "certifications" included "Art Therapy," "Biofeedback," and "Eye Movement Desensitization." His "experience" consisted of one year at an adolescent shelter, one year as a sex abuse counselor, one year working with homeless children, one year as a counselor in a "wilderness school," a year and a half at a community agency, and four years working for another psychiatrist as a therapist. He had no training in forensic psychology and he had never testified as an expert before.

Gentry offered a "psychosocial" history of Owens's life. He concluded that because Owens grew up in a poor home where she suffered physical and emotional abuse and later suffered additional physical, sexual, and emotional abuse at the hands of Ronald Owens, she "developed very poor problem-solving and conflict resolution skills" and thus warranted leniency. Almost all of this report was hearsay, some of it "double and triple hearsay from anonymous persons." Gentry produced no medical evidence and performed no clinical tests. He also relied extensively on reports from members of Owens's family (whom Owens refused to let her counsel contact) and on statements from Owens herself (who refused to testify at trial, and certainly has a motive to be less than truthful). One of his major sources was Owens's brother Wilson, yet Gentry admitted on cross-examination that he did not know that Wilson, who lived in an adult care facility, suffered from mental retardation. Owens's sister Carolyn Hensley testified that when she spoke with her brother Wilson about Gentry's interview, Wilson was "very confused and had been manipulated by somebody." Given Gentry's extensive reliance on Wilson's testimony, Hensley's observation did not help Gentry's credibility. Nor did the fact that Gentry testified on direct examination that he had verified one incident of abuse with Owens's family members but later admitted on cross-examination that he had not. Even if one accepts his unverified allegations of trauma, to the extent that those allegations rest on hearsay from Owens or her family, *they are irrelevant to Owens's IAC claim because Owens's counsel wanted*

to present the substance of such evidence directly at trial through the testimony of Owens and her family, but Owens refused to cooperate.

Finally, any evidence that Gentry would have presented at trial easily could have been contradicted and would have opened the door to evidence unfavorable to Owens. Gentry claimed that Owens's husband had once raped Owens with a wine bottle and broken the neck off inside Owens's vagina, yet there is no other evidence that such an assault occurred. Gentry quoted Owens's brother Wilson as saying that life growing up was a "living hell," but this testimony could be contradicted by presenting Hensley's testimony about Wilson's mental limitations and evidence that he had been "manipulated." Gentry claimed that Owens told him that she hired the hitman in a single moment of depression; trial testimony indicated that she had solicited multiple hitmen over a period of weeks. Gentry claimed that Owens was sexually abused by her uncle and reported the incident to her mother but later admitted that Owens's mother said that no sexual abuse occurred. Owens's sister stated that while their father was "too aggressive with discipline[ ]," the severe abuses that she reported to Gentry never happened. Hensley further testified that she did not trust what Owens said because "over a period of years" Owens would "just lie about stuff." Nothing in Gentry's testimony, even if we consider it, supports finding that Owens's counsel's performance was ineffective.

C

One of the few avenues Owens's counsel could have used to present mitigating evidence was the government's mental health experts at Midtown. Owens answered certain questions before refusing to cooperate further, and the experts could have testified to the answers she gave if trial counsel had issued a subpoena. Although the information was hearsay, it would have been admissible under Tennessee law in the penalty phase of her trial. Notes from the first meeting report that "[i]n relating the events that led up to the alleged crime, she described an unhappy marital situation in which her husband abused her verbally, had affairs, and humiliated her sexually." Another set of (handwritten and hard to read) notes related the following information:

> 1st Marr[iage] for both. 13+ years. Never sure that Ron loved me. He was not one to express feelings. Caught up in the job & [ ]. 2 little boys. He was a good daddy. Didn't spent time with them but loved them. [I][n]eeded to feel loved – [w]ouldn't be married unless love. [Ron was?] only affect[tionate?] in bed. He didn't think affect[tion] import[ant] but it was to me.
>
> Last 4-5 yrs. affairs. Didn't [illegible] he didn't deny. None of my business. I run house. It built up in me. I felt like explode. Ask for Div[orce]. He told me I never get kids. Beg him for compliments. Couldn't cope [,] gained weight. Ask[ed] for him to tell me I look nice. He say you don't sweat much for a

> fat person. Begged him to tell me what I do wrong and I change. Waited on him. [Told?] . . . No ackn[owledment?].
>
> Couln't cope anymore. 1 yr. ago [?] 8 months. Accused of paying men to kill him. The one in custody.

(handwritten notes). Counsel could have presented this evidence to the jury and could have called the staff to testify about Owens's demeanor during this preliminary interview. The key is that counsel could have called these Midtown counselors because they were one of the few witnesses that Owens did not forbid her attorneys from contacting.

Furthermore, when preparing for the state post-conviction hearing, a staff attorney from the Capital Case Resource Center of Tennessee interviewed Owens, and the interview notes were introduced at the post-conviction hearing. According to the notes, Owens claimed that: 1) her alcoholic father abused both Owens and her mother; 2) her uncle once fondled Owens; 3) her husband had affairs; 4) her husband abused her physically and sexually; 5) she felt confused by the conflict between how she saw her situation and how others saw it. There is no evidence that Owens would have cooperated if a similar person would have interviewed her before trial. If she would have cooperated, perhaps her attorney could have called this hypothetical person from the Capital Case Resource Center and thereby presented this information at the penalty phase. But given her refusal to testify or to cooperate during her trial, it is at best

barely plausible that her attorney could have presented this evidence.[5]

Even if Owens would have cooperated, this hypothetical witness's testimony would suffer several obvious flaws. None of it is firsthand knowledge; it is hearsay from statements that Owens made *after* the murder and thus it lacks credibility. The jury would have seen that Owens was trying to tell her story without swearing to tell the truth or facing cross-examination. Furthermore, this evidence would have permitted the state to bring in Owens's statement to the police that "there was very little physical violence" in their marriage. Likewise, the state could have responded by calling Carolyn Hensley and having her testify, as she did at the post-conviction hearing, that Owens was lying about the extent of her abuse and generally "lied about stuff." The state could also have asked the witnesses if they knew of Owens's prior convictions for embezzlement and forgery. This potential impeachment shows why an effective attorney would hesitate to present this "mitigating" evidence and why Owens was not prejudiced by its absence.

Two other minor pieces of evidence exist. Hospital records show that after the birth of one of her children, Owens suffered vaginal bleeding secondary

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[5] Notably, Owens's brief utterly fails to explain her repeated non-cooperation with her trial counsel throughout her entire trial.

to a fifteen percent partial abruptio placenta. This is at least consistent with her allegation, made second-hand through Gentry's report, that her husband sexually abused her the night before. But it does not prove her claim because the injury could have happened many other ways. No medical testimony established even speculative causation. Finally, Owens claims that her trial counsel could have learned of evidence that her husband lied about being wounded in Vietnam and about his educational history. Trial counsel Marty acknowledged that he "did not request any school, employment, or military records of the victim because he believed they were irrelevant to the case." But even if we made the dubious assumption that this "general bad character" evidence is admissible, its connection to her husband's abusive conduct is too remote (especially when she refused to testify to that abuse) to say the state court's holding was objectively unreasonable.

D

With that background, we turn to the merits of Owens's IAC claim.

1. Counsel Was Not Ineffective For Failing to Investigate Owens's Background

As mentioned earlier, a limited investigation into a defendant's background is reasonable if defense counsel could reasonably have concluded that further investigation would be of little use. *Wiggins,* 539 U.S.

at 525, 123 S.Ct. 2527. Furthermore, *Strickland,* the foundational IAC case, emphasized that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052.

Counsel's decisions here were reasonable, so counsel's performance was not deficient. Counsel could have reasoned that additional investigation would be of little use because Owens's own actions shut off the avenues for mitigation. Owens would not take the stand herself, would not cooperate with mental health examiners, and would not allow counsel to communicate with her family. Her actions mirror the conduct of the defendant in *Coleman*, who "did not cooperate with counsel regarding the investigation and identification of mitigating evidence; imposed restrictions upon counsel; and refused to submit to further psychological or psychiatric testing." *Coleman,* 244 F.3d at 545. There, we held that any failure to present mitigating evidence was the result of Coleman's actions, not deficient performance by his counsel, and denied the claim, holding that "[a]n attorney's conduct is not deficient simply for following his client's instructions." *Ibid.* The Supreme Court reached a similar decision in *Schriro,* holding that the client's own "established recalcitrance" and persistent

"undermining" counsel's efforts defeated her IAC claim. *Schriro,* 127 S.Ct. at 1941-42.

A defendant cannot be permitted to manufacture a winning IAC claim by sabotaging her own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn her sentence on appeal. Owens made the same decision as the *Coleman* and *Schriro* defendants and must suffer the same consequences. Other cases from our own circuit confirm that a client who interferes with her attorney's attempts to present mitigating evidence cannot then claim prejudice based on the attorney's failure to present that evidence. *See Fautenberry v. Mitchell,* 515 F.3d 614, 624 (6th Cir.2008) (counsel is not ineffective for failing to persuade client to cooperate); *Lorraine,* 291 F.3d at 435 ("Trial counsel cannot be faulted for their client's lack of cooperation."); *Coleman,* 244 F.3d at 545 ("An attorney's conduct is not deficient simply for following his client's instructions."). Other circuits have reached similar conclusions. *See Gardner v. Ozmint,* 511 F.3d 420, 427 (4th Cir.2007) (relying on client's non-cooperation when rejecting ineffective assistance claim based on attorney's failure to investigate mitigation evidence); *Taylor v. Horn,* 504 F.3d 416, 454-56 (3d Cir.2007) (relying on client's refusal to allow attorney to call witnesses in rejecting ineffective assistance claim); *Roberts v. Dretke,* 356 F.3d 632, 638 (5th Cir.2004) (holding that "when a defendant blocks his attorney's efforts to defend him, including forbidding his attorney from interviewing his family members for

purposes of soliciting their testimony as mitigating evidence during the punishment phase of the trial, he cannot later claim ineffective assistance of counsel."); *Bryan v. Mullin,* 335 F.3d 1207, 1223-24 (10th Cir.2003) (en banc) (counsel not ineffective for failing to present mental health evidence when client told counsel not to present any mental health evidence).

Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), does not change this result. *Rompilla* held that even when the defendant and the defendant's family tell counsel that no mitigating evidence exists, counsel must nevertheless make a reasonable investigation of evidence that counsel expects the prosecution to rely on at trial. *Id.* at 377, 125 S.Ct. 2456. That is not the situation here. The state did not plan on using against Owens any of the evidence that Owens's counsel allegedly should have discovered. *Cf. Keith v. Mitchell,* 455 F.3d 662, 671 (6th Cir.2006) (observing that *Rompilla* held only that "counsel must investigate evidence it knows the state will use against defendant"). Counsel did not conclude, based on Owens's statements, that no mitigating evidence existed. Rather, counsel realized, based on Owens's conduct and instructions, that there was no credible way to present this evidence to the jury.

Even if we assumed that counsel's performance was deficient, Owens suffered no prejudice. *Schriro* held that obedience to a client's instructions "*could not* have been prejudicial under *Strickland*." *Schriro,* 127 S.Ct. at 1941 (emphasis added). Therefore, the

absence of any evidence that required testimony from Owens or information from her family could not have been prejudicial. The limited evidence that counsel could have presented without testimony from Owens or her family – the report from the mental health experts at Midtown, the medical report of her injury the day before her pregnancy, her husband's military records, and (perhaps, assuming she would have co-operated) the information gleaned from someone like the attorney from the Capital Resource Center – is not evidence that was reasonably likely to lead to a different results. Prior cases have refused to find the absence of similar background evidence prejudicial. *See Nields v. Bradshaw,* 482 F.3d 442, 454 (6th Cir.2007) (evidence that the defendant had a "chaotic and neglected" childhood, suffered from alcoholism, and had a good work ethic); *Keith,* 455 F.3d at 670 (evidence that the defendant's "mother was a drug addict, that he was mostly raised by his grandparents, that his grandmother was a convicted murderer, and that his father was 'known to gamble and run the streets.'"). Even if this evidence would have been introduced, it would have had little credibility (especially since the jury would have seen that it was being presented secondhand through hearsay), would have been subject to contradiction, and would have opened the door for impeachment evidence. What little credibility it had would not overcome the overwhelming case against Owens and the premeditated and brutal nature of the crime. *Cf. ibid.*(holding that given strong evidence of guilt and premeditation, any omitted evidence "does not demonstrate that Keith's

life had been so terrible that he was materially less culpable.").

Furthermore, Owens's entire IAC claim boils down to a claim that her counsel should have presented a "battered-wife syndrome" defense. Yet her trial counsel looked into both a battered wife syndrome defense and an insanity defense – indeed, Mr. Emmons mentioned both defenses by name to the trial judge. It is in cases like this one, where the current record offers the defendant a plausible defense that trial counsel never made, that the "distorting effects of hindsight" and the temptation to "second-guess counsel's assistance after a conviction" that *Strickland* warned against exert their strongest influence. *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. But it is cases like this where we must be careful to follow *Strickland*'s advice and focus on counsel's perspective at the time. *See ibid.* It is not trial counsel's fault that Owens refused to cooperate and give them the evidence or permission to contact family members that they needed to make such a defense. Under the "highly deferential" review of *Strickland, ibid.*, and the additional deference of AEDPA, we conclude that counsel did the best they could with a recalcitrant client.

2. Counsel Was Not Ineffective For Failing to Obtain Funds for an Independent Mental Health Expert.

As previously explained, this claim has not been certified for appeal and will be given no further discussion.

3. Counsel was Not Ineffective for Failing to Overcome the State's Hearsay Objection to the Testimony of Dr. West.

During the sentencing phase, trial counsel called Dr. Max West, a psychiatrist who had seen Owens for a single one-hour session in 1978. Owens's counsel asked West what Owens told West about her family history. The state objected on grounds of hearsay, and the defense withdrew the question. Later, defense counsel asked the same question in a different way, and once again the state objected. Ultimately, West testified only that Owens had "some kind of severe problem."

Tenn.Code Ann. § 39-2-203(c) (1982) would have permitted West to answer the question because it allows testimony about a defendant's background at a capital sentencing proceeding "regardless of its admissibility under the rules of evidence." Counsel never cited this statute. The state court ruled that this decision was a legitimate strategic decision that was neither defective nor prejudicial to Owens. The district court interpreted the state court as having made a "factual" determination, and found that this

determination was not objectively unreasonable. Although the district court incorrectly called the question of prejudice a "factual" question rather than a "mixed question of law and fact," *see Strickland,* 466 U.S. at 698, 104 S.Ct. 2052, its ultimate conclusion was correct.

Owens argues that if West had testified further, he would have said that Owens told him that: 1) her parents were too hard on her; 2) she was forced to care for a mentally retarded brother; 3) her parents habitually lied to each other and to the children; 4) she never felt like she was needed; and 5) she had a "fairly severe characterological [sic] or personality disorder."

Although trial counsel's failure to overcome the hearsay objection looks deficient at first glance, it may not have been deficient because Marty testified at the post-conviction hearing that he had good reasons for not wanting further testimony from West. Marty said that he "was fearful of what [West] was going to testify to." The statements Marty "feared" included a statement by West that Owens was "a pathological liar and possibly could commit homicide." However, at the post-conviction hearing, West denied commenting about Owens's "homicidal tendencies" or describing her as a "pathological liar," but acknowledged that he knew that she had "a serious problem telling the truth."

Even if we disbelieved Marty's testimony about what West told Marty and concluded that counsel's

failure to overcome the hearsay objection was defective, the state courts reasonably concluded that it was not prejudicial. West's testimony would have related a harsh childhood, but it would not have established the kind of extreme physical and sexual abuse that Owens later claimed to have experienced. Nor would it have established the kind of childhood that could have made Owens less culpable in the eyes of the jury. *Cf. Keith,* 455 F.3d at 670. As with the hypothetical testimony from Gentry or the Midtown mental health counselors, the jury would have realized that West's testimony was merely relating second-hand information that Owens provided years before the murder.

Marty also recognized that if he pressed West further, the prosecution would have asked West on cross *why* Owens went to see him, and West would have been forced to respond that she had done so after being charged with embezzling money. Likewise, West testified at the post-conviction hearing that when he saw Owens, she reported that "everything was fine with her husband." The prosecution could have brought this information up on cross-examination if West had spoken more at trial, and it could have forced West to acknowledge Owens's tendency to lie. Given this looming impeachment evidence, Owens was not prejudiced by West's silence.[6] Instead, West

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[6] Marty testified that he saw Dr. West's files on Owens, but he did not read every page carefully. Thus, it is not absolutely certain that Marty knew of all the potential impeachment

(Continued on following page)

was able to state Owens had a "severe problem" without explaining what that problem was, thus allowing the jury to make a favorable inference.

IV

Owens claims that the state violated *Brady* by failing to turn over: 1) sexually suggestive cards and love notes between Ronald and Gala Scott; and 2) a police report that discussed these notes and summarized an interview with Scott in which she admitted to the affair. The state court denied these claims on grounds that: 1) these notes were not favorable, and therefore not *Brady* material; and 2) Owens could have put on other evidence about the affair, but did not, and therefore was not prejudiced by not receiving the notes. The state court's conclusion that the materials are not favorable is dubious, but the district court correctly denied habeas based on a finding of no prejudice.

A

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), obligates the government to turn over evidence that is both favorable to the accused and material to guilt or punishment. "There are three components of a true Brady violation: the

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evidence when he interviewed West. Nevertheless, Marty's knowledge goes only to whether his performance was deficient, not to prejudice.

evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Prejudice in the Brady sense means the same as in the Strickland sense: a reasonable probability that there would have been a different result had the evidence been disclosed. *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Critical to *Brady* is the rule that:

> *Brady* obviously does not apply to information that is not wholly within the control of the prosecution. There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose.

Coe v. Bell, 161 F.3d 320, 344 (6th Cir.1998) (internal citations and quotations omitted). This rule makes sense because if the defendant could have presented similar evidence to prove the same point that the allegedly-suppressed information would have been introduced to prove, but did not, it is not reasonably probable that government disclosure would have led to a different result.

B

Owens specifically requested all evidence about Ronald's "extra-marital affairs," and said that she had "good reason" to think that letters discussing those affairs were found among Ronald's possessions when the police searched Ronald's office and seized much of the evidence they found there. The record does not make clear the precise history of who possessed the letters and when they did so. The murder occurred on February 17, 1985. The police report shows that the next day, the officers found several notes and cards to Ronald from Gala Scott in Ronald's office. Police Chief Wray testified at the post-conviction hearing that these "notes" were sexual in nature. The police report shows that police interviewed Gala Scott the next day, and Scott admitted to the affair.

Wray testified that the police took the notes from Scott "back to our office." After "some time," Gala Scott asked for them back. The police checked with an unknown city attorney, who said that the letters were irrelevant, and then returned the letters to Scott. It is not clear when this call was made, or which attorney said that the letters were not relevant, but it is clear that the letters were never in the possession of the prosecutor.

When Owens filed her request, the prosecution told the court that it had turned over "everything we have in the way of any kind of physical evidence." While this may have been technically true because

the prosecutors never handled the letters, it was not true for purposes of *Brady*. *Brady*'s disclosure requirement includes not just information in the prosecutor's files, but "information in the possession of the law enforcement agency investigating the offense." *Jamison v. Collins,* 291 F.3d 380, 385 (6th Cir.2002). These letters were at one time in police possession, but whether by accident or on purpose, those letters were never shown to Owens.

C

The state court of appeals, in its post-conviction ruling, concluded that no *Brady* violation occurred because the letters were not favorable evidence. This ruling is questionable. There is a longstanding, commonsense belief in our culture that people who kill their spouses because of infidelity are not as morally culpable as other murderers. Owens points to Tennessee cases where marital infidelity reduced a murder to "something less than a death penalty case." *See* Petr.'s Reply Br. 7 (collecting cases). On the other hand, these cases are all "heat of passion" cases where the killing took place immediately, in person, and upon discovery of the infidelity instead of weeks later, in cold blood, and second hand through a hired killer. Owens's counsel also suggested that the evidence could have given the jury a stronger motivation to impose the death penalty because it would have looked like blaming the victim and might have reinforced Owens's guilt in the jury's mind. Furthermore,

the district court observed that the specific contents of the letters:

> would be of questionable relevance to Petitioner's case in mitigation because aspects of her husband's affair that she did not know about cannot be said to have affected her state of mind and are therefore not probative of her contention that her husband's affair drove her to precipitate his murder.

Nevertheless, we will resolve this point in Owens's favor and assume that the letters contained favorable information and reject her claim on the ground that she suffered no prejudice.

Owens knew that Ronald was having an affair with Scott. Her brief attempts to transmute that "knowledge" into a mere "suspicion." (Petr.'s Br. at 66). This is a futile task, because her own habeas petition admits that "she [Owens] received an [anonymous] letter made up of words cut out of a magazine telling her that everyone but Ms. Owens knew that Mr. Owens was having an affair with Ms. Scott." The petition also relates an incident where Owens caught Scott and Ronald together in a parking lot, and Ronald reacted in a hostile manner when so confronted. Owens's petition also claims that this very incident of catching them together prompted Owens to hire the hitman. Owens *knew* of the affair, and if she wanted to present evidence of the affair, she could have testified, produced the anonymous

letter, or subpoenaed Scott.[7] Owens "knew or should have known the essential facts permitting h[er] to take advantage of any exculpatory information," and the evidence she wanted was clearly "available . . . from another source." *Coe,* 161 F.3d at 344.

Owens responds that even if she knew of the affair, she needed the letters to prove the affair to the jury. She analogizes to *Brady* itself, where the defendant knew that he did not kill the victim, but did not know about the confession from his co-defendant that would have permitted him to prove his innocence. But even if we accept Owens's distinction between knowledge and proof, she still loses because the proof she needed was available elsewhere. At minimum, she could have subpoenaed Gala Scott. *Coe* explained that when the defendant "had as much access as the police" did to the relevant witnesses, the information is "not under the sole control of the government." *Coe,* 161 F.3d at 344.

Owens's final argument is that if she had called Gala Scott, Scott would have lied and offered

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[7] Indeed, it is not clear from the J.A. whether the police had already given the letters back to Scott when Owens filed her request. If they had already done so, the relevant evidence would not merely be "available . . . from another source," *Coe,* 161 F.3d at 344, but *only* available from another source. This would weaken, if not destroy, Owens's *Brady* claim as to the letters. The police report, which is far less helpful to her, was in police possession the entire time and would remain *Brady* material. Given the uncertainty, we will assume that the police still had the letters when Owens filed her request.

testimony harmful to Owens. Owens's argument amounts to a concession she had some evidence of her husband's infidelity coupled with an assertion that she did not raise the infidelity issue because she considered her evidence too weak, but she would have raised the issue if she had stronger evidence.

The first problem with Owens's argument is that she offers no evidence that Scott would have refused to testify, no evidence that Scott would have committed perjury, and no evidence that she has even tried to contact Scott at any point in this litigation. Scott acknowledged the affair to the police, which suggests that she was not taking a position of outright denial. It is Owens who must prove prejudice, and she cannot do so without evidence.

The second problem is that Owens's argument contradicts our cases because *Brady* does not apply when the defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory information." *Coe,* 161 F.3d at 344. In *Puertas v. Overton,* 168 Fed.Appx. 689 (6th Cir.2006), we denied a habeas petition based on the prosecution's failure to turn over a state report on corruption within the police department that investigated the defendant. *Id.* at 698. The petitioner complained that because he did not have the report, he was not able to interview and call witnesses who might have disproved some of the evidence against him. We rejected his claim because the record showed that he "knew of these allegations [of corruption] before trial" but did not follow up with any of these potential witnesses.

Ibid. In *Matthews v. Ishee,* 486 F.3d 883 (6th Cir.2007), we repeated the rule that *Brady* does not apply when the information is available from another source, and denied the petition because the information not disclosed could have been deduced by looking at public records. *Id.* at 891.

The most relevant case is another death penalty habeas case, *Benge v. Johnson,* 474 F.3d 236 (6th Cir.2007). There, the petitioner claimed that police did not disclose a statement that one witness, Fuller, made to the police that could have been used to impeach the statement of Shields, another witness, that the petitioner had confessed to the murder. *Id.* at 242. The court rejected the *Brady* claim, ruling that "[i]f Benge believed that Shields was lying, . . . Benge could have called Fuller as a witness to testify about the night in question and thus contradicted Shields." *Id.* at 243. Thus, Benge "knew the essential facts permitting him to take advantage of what Fuller may have been able to say on the subject because he knew that Fuller was in the house that night." *Ibid.* Identical reasoning applies here. Owens did not have Scott's letters to Ronald, just as Benge did not have Fuller's statements to the police. But both petitioners knew the underlying facts and could have called the witnesses, but did not.

Owens's suggestion that Gala Scott might have committed perjury is equally applicable to the witness in *Benge.* Perhaps we would have ruled differently on Owens's *Brady* claim if we were the state court, but we are not the state court. We may grant

relief only if Owens's claim passes the "substantially higher threshold," *Schriro,* 127 S.Ct. at 1939, of AEDPA deference. In that role, we follow *Benge* and hold that the state court did not unreasonably apply *Brady.*

V

Owens claims that the state violated her right to present mitigating evidence when it refused to let her introduce evidence that she had been willing to accept the state's offer of a life sentence in return for a guilty plea. On direct review, the Tennessee Supreme Court rejected this claim. The district court concluded that this decision reasonably applied *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The district court is correct because Owens offers no case holding that a state court should have admitted evidence of this nature; indeed, a case from the Eighth Circuit, which she cites, affirmed a state court decision to exclude such evidence.

A

In *Lockett,* a plurality of the Supreme Court said that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 98 S.Ct. 2954

(plurality opinion). As a constitutional requirement, this rule trumps other limits on admissible evidence, such as hearsay. Yet the Court qualified this broad statement with a footnote stating that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604 n. 12, 98 S.Ct. 2954.

The Court adopted the *Lockett* plurality in *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), holding that in a capital case, the sentencer cannot refuse "to consider, as a matter of law, any *relevant* mitigating evidence." *Id.* at 114. *Eddings* also confirmed that the question is not merely one of general mitigating relevance, but of relevance to "any aspect of the defendant's *character* or *record* or any *circumstances of the offense.*" *Id.* at 110, 102 S.Ct. 869 (emphasis added). At capital sentencing hearings, as elsewhere, "relevant evidence" means evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Tennard v. Dretke,* 542 U.S. 274, 284, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

Although Owens is right that these cases permit defendants to introduce any *relevant* mitigating evidence, she is wrong to assume that they make all evidence automatically relevant because *Lockett* "does not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes." *United*

States v. Purkey, 428 F.3d 738, 756 (8th Cir.2005). Footnote 12 in *Lockett* explicitly stated that lower courts could continue to exclude as irrelevant evidence not bearing on the defendant's character, prior record, or the circumstances of the offense. *Lockett,* 438 U.S. at 604 n. 12, 98 S.Ct. 2954. The Supreme Court confirmed that *Lockett* did not make all evidence automatically relevant when it relied on this footnote to hold that courts may exclude certain evidence from capital sentencing hearings as irrelevant. For example, in *Oregon v Guzek,* 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006), the Court unanimously held that a defendant has no right to present new evidence of his innocence at the sentencing hearing even though the defendant claimed that the evidence related to the "circumstances of his offense." *Id.* at 523-24, 126 S.Ct. 1226; *see also Blystone v. Pennsylvania,* 494 U.S. 299, 306-07, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (no right to jury instruction encouraging jury to weigh lack of severity of aggravating factors as a mitigating circumstance); *Franklin v. Lynaugh,* 487 U.S. 164, 174, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion) ("residual doubt" as to defendant's guilt not a circumstance of the offense). Our circuit recognized that *Lockett* permits courts to exclude irrelevant evidence at capital sentencing hearings and quoted footnote 12 when it affirmed a Tennessee court's decision to exclude from a capital sentencing hearing videotaped interviews in which psychologists discussed the defendant's alleged multiple personality disorder. *Alley v. Bell,* 307 F.3d 380, 392, 399 (6th Cir.2002).

B

As mentioned above, the prosecution offered Owens and Porterfield a life sentence in return for a guilty plea, but conditioned the plea on both defendants' acceptance of the offer. Owens wanted to accept the deal, but Porterfield refused to plead, so the prosecution withdrew the offer. Owens sought to present evidence that she wanted to accept the prosecution's offer at her sentencing hearing, but the state court refused to allow her to tell the jury about the failed plea negotiations.

On direct appeal, the Tennessee Supreme Court cited both the general principle in *Lockett* and the language in footnote 12 before concluding that Owens's "interest in accepting a plea bargain offer is not relevant either to the issue of punishment or to any mitigating factor raised by the defendant, and was in our opinion properly excluded." In the state habeas proceedings, the state court cited the Tennessee Supreme Court's opinion, and added that Owens's "confession was entered at trial, so proof that [she] had accepted responsibility was already before the jury." While the state courts offered only a truncated analysis, they did not unreasonably apply clearly established federal law.

C

Owens's best argument is that the evidence is relevant to the positive character trait of "acceptance of responsibility." While "acceptance of responsibility"

could be a reason for mitigation, Owens's proffered evidence shows no such acceptance. She did not offer to plead guilty unconditionally, which she could have done. Instead, she agreed to plead guilty only if guaranteed a life sentence in return. Offering an unconditional guilty plea, contrary to the dissent at 28, would not have been volunteering for death or accepting the *lex talionis*. It simply would have accepted responsibility, and her punishment then would have been in the hands of the jury, just as it ultimately was. Thus, she was less interested in accepting responsibility and more interested in avoiding the electric chair, a motivation that is much less persuasive as a mitigating factor. It is telling that prior to trial she argued that the court should enter her guilty plea – despite the breakdown of negotiations with the state and over its objection – only because "this case carries the ultimate [punishment,] death by electr[o]cution" and because Owens "wants this matter done with and over with," but not because she had accepted responsibility for her crime. She did not offer any other evidence of acceptance of responsibility or, as the district court noted, take the stand to "express remorse or contrition in hopes of mitigating her sentence . . . to the jury directly" even though she could have done so.[8]

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[8] Owens contends that the Tennessee Supreme Court's conclusion that her failed plea bargain was "not relevant to any mitigating factor raised by the defendant" is circular because the plea bargain *was* the mitigating factor she was seeking to raise.

(Continued on following page)

The failed negotiations are not related to Owens's "record." Likewise, they are not related to the "circumstances of the offense" because the plea offer says nothing about how the murder was committed. Owens posits that the offer is relevant to the circumstances of the offense because it suggests that the prosecution did not think that her crime deserved a death sentence. This is speculation on her part because the record does not explain whether the prosecution made the offer because it saw her as unworthy of death or for some other reason such as the efficient use of prosecutorial resources. Owens attempts to treat "circumstances of the offense" as a catch-all category to present any mitigating evidence she wishes to present, but the Supreme Court has not treated "circumstances of the offense" in such a haphazard manner. *See Guzek,* 546 U.S. at 523-24, 126 S.Ct. 1226; *Blystone,* 494 U.S. at 307, 110 S.Ct. 1078; *Franklin,* 487 U.S. at 174, 108 S.Ct. 2320.

Owens cites multiple cases that speak of the relevance of a defendant's acceptance of responsibility, but none of them are on point because none involve the specific situation where the defendant wants to plead guilty on condition of receiving a life

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(Petr.'s Reply Br. at 15). The problem with the argument is that Owens could have offered other evidence of acceptance of responsibility but she did not do so. The government introduced Owens's post-arrest confession at trial, in which she initially denied intent to kill her husband and admitted only to hiring people to "rough him up."

sentence, the prosecution withdraws the offer, and the defendant then wants to present the failed negotiations to the jury. Some of Owens's cases are irrelevant because they address situations where the government accepted the defendant's guilty plea instead of rejecting it. *See, e.g., Bradshaw v. Stumpf,* 545 U.S. 175, 185-86, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005); *St. Pierre v. Walls,* 297 F.3d 617, 623 (7th Cir.2002). Other cases she cites, like *Davis v. Coyle,* 475 F.3d 761 (6th Cir.2007), do not mention acceptance of responsibility or plea agreements at all.

Unfortunately for Owens, the cases that are squarely on point reject her theory – even though she cites some of them as supporting her theory. Owens cites *Riley v. Cockrell,* 339 F.3d 308 (5th Cir.2003), for a rule that "acceptance of a guilty plea was mitigating evidence that could have been presented at sentencing." (Petr.'s Reply Br. 13). But we cannot see how *Riley* helps Owens's argument because *Riley* denied a certificate of appealability to a death row inmate who wanted to argue that his trial counsel was ineffective for not arguing that the inmate's guilty plea constituted mitigating evidence. *Id.* at 317-19. *Hall v. Luebbers,* 341 F.3d 706 (8th Cir.2003) is the only federal court of appeals case we can find[9] that

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[9] A federal district court concluded in *Jeffers v. Ricketts,* 627 F.Supp. 1334 (D.Ariz.1986), *reversed on other grounds by Lewis v. Jeffers,* 497 U.S. 764, 777, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990), that if the capital defendant had presented evidence of failed plea negotiations, that evidence should have been

(Continued on following page)

specifically considers failed plea negotiations under *Lockett*. Owens ironically cites *Hall* in support of her argument, but *Hall rejected* the capital defendant's claim that "the trial court violated his Eighth and Fourteenth Amendment rights by excluding evidence of Hall's willingness to plead guilty." *Id.* at 717. In *Hall,* the defendant agreed to plead guilty if the state would recommend a life sentence. But the state conditioned the agreement on Hall's passing a polygraph test, and when the test results were inconclusive, the state revoked the offer. *Id.* at 715. Hall wanted to present evidence of the failed plea negotiations to the jury, but the court held that *Lockett* did not require the evidence to be admitted and added that even if the evidence should have been admitted, its exclusion was "harmless beyond a reasonable doubt." *Ibid.*

In *Ross v. State,* 717 P.2d 117, 122 (Okla.Cr.App. 1986), which the district court cited as the only case it could find on point, reached the same conclusion. It directly held that a capital defendant had no right to present, as mitigating evidence, a negotiated plea agreement that was later withdrawn. *Ibid.* In *Bennett v. State,* 933 So.2d 930, 953 (Miss.2006), the defendant argued that the trial court should have permitted him to present evidence that he had been offered a plea bargain in return for a life sentence. The Supreme Court of Mississippi rejected the

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considered. *Id.* at 1358-59. However, we do not consider *Jeffers* even persuasive because that case was decided before AEDPA.

defendant's interpretation of *Lockett,* observing that the defendant "failed to cite a single case holding that plea bargains must be admitted at sentencing." *Ibid.* Numerous other state supreme courts have also concluded that failed plea negotiations are not admissible at capital sentencing hearings. *Howard v. State,* 367 Ark. 18, 238 S.W.3d 24, 47 (2006) (holding, in context of ineffective assistance claim, that "*Lockett* did not hold that plea offers are admissible as mitigating circumstances"); *Neal v. Commonwealth,* 95 S.W.3d 843, 852 (Ky.2003) (plea offer not admissible as mitigating evidence at capital sentencing hearing under *Lockett*); *State v. Morganherring,* 350 N.C. 701, 517 S.E.2d 622, 639-40 (1999) (same); *Wisehart v. State,* 693 N.E.2d 23, 64-65 (Ind.1998) (same); *People v. Zapien,* 4 Cal.4th 929, 17 Cal.Rptr.2d 122, 846 P.2d 704, 739 (1993) (same); *Wiggins v. State,* 324 Md. 551, 597 A.2d 1359, 1370 (1991) (same), *reversed on other grounds* by *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Ross also explained why a defendant's thwarted desire to accept a plea should not be admitted at capital sentencing cases.

> Allowing a defendant to use plea negotiations in mitigation would clearly discourage plea negotiations in capital cases as prosecutors would correctly fear that during the second stage proceedings, they would be arguing against themselves. Plea bargaining is to be encouraged, not discouraged, and

> therefore is improper evidence to present in mitigation.

Ross, 717 P.2d at 122. This reasoning persuades us, and explains why every court to hear Owens's argument has rejected it. We repeat that under Supreme Court precedent Owens can prevail only if the state courts unreasonably applied clearly established federal law. *(Terry) Williams*, 529 U.S. at 411-12, 120 S.Ct. 1495. A rule of federal law cannot be clearly established when it has been rejected by every court that has been asked to adopt the rule, and a state court does not unreasonably apply clearly established federal law when it rejects an argument that has been unanimously rejected by other courts. Owens's real complaint is that the Tennessee Supreme Court did not expand *Lockett*, but that is not the standard we are duty-bound to apply.

VI

For many of the points of the dissent, a careful examination of the relevant part of this opinion, and the cases and portions of the record cited therein, suffices for refutation. Taking the last issue in this case first, for the contrast between the dissent's claim that Owens is entitled to present "any relevant evidence," Dissent at 28, and the Supreme Court's statement that Owens is entitled to present evidence relevant to "any aspect of [her] *character* or *record* or any *circumstances of the offense*," see *Eddings*, 455 U.S. at 110, 102 S.Ct. 869. For proof that the state court's

refusal to allow Owens to present evidence of the failed plea negotiations did not violate clearly established federal law, contrast the cases cited in part V.C. of this opinion that have rejected the specific argument that Owens is making with the dissent's failure to cite a single case that has accepted Owens's specific argument.

Moving to the question of ineffective assistance of counsel, for refutation of the dissent's contention that the majority has "singular[ly] reli[ed]" on *Schriro,* see the cases cited in part III.D. of this opinion. For refutation of the dissent's claim that Owens "did not even refuse to cooperate" with her attorney, Dissent at 428, see pages 406-08 of this opinion, where we detail, with extensive citations to the record, Owens's non-cooperation. For refutation of the dissent's characterization of this opinion as saying that trial counsel were justified in abandoning the domestic violence defense based on Owen's refusal to testify herself, see the discussion, at page 406, of Owens's refusal to cooperate with the state mental health examiners and her refusal to let trial counsel interview her family. Note that the majority relies not only on testimony from Owens's trial counsel, but on testimony from Owens's own sister that Owens had ordered her counsel "not to involve [the family] in any way" with the trial. The dissent appears to find that this testimony does not exist. Likewise, for refutation of the dissent's unsupported assertion that trial counsel were too incompetent to obtain a mental health expert to testify to Owens's mental condition, Dissent at

429-30, see footnote 2 of the majority opinion. Finally, the dissent quotes at length from statements in Owens's brief that rely on Eric Gentry's report, Dissent at 428-29, and refers to Gentry as "an expert in the field." Dissent at 430. For an explanation of why Gentry's testimony should not be accepted uncritically, see the majority opinion at 408-10.

As to the *Brady* issue, the dissent claims that the majority has held that if a defendant has "reasonable suspicion of a fact, the defendant is not entitled to exculpatory evidence regarding that fact. . . ." Dissent at 425. For refutation of this claim, see the majority opinion, which does not include the phrase "reasonable suspicion," and see pages 425-26 of the majority opinion, which explains that in this case, Owens *knew* of the affair. And for refutation of the dissent's claim that the majority's rule is somehow novel or "nonsens[ical]," see the cases, including *Coe, Matthews,* and *Benge,* cited in the majority opinion at pages 417-18 and not refuted by the dissent.

A few of the dissent's arguments require a more detailed answer.

First, the entire premise of the dissent's rhetoric is that counsel were obviously incompetent for not relying on what is called, in parts of both my state and that of the dissenter, the "he just needed killing" defense. While it could be true that a counsel of the dissenter's skill could have sold a jury on that defense, there are many reasons that counsel could

have thought otherwise – and making such a choice is the essence of a "strategic" choice.

* Unlike the classic case of killing a spouse taken "in flagrante," the evidence here was that Mrs. Owens cooly interviewed a series of potential hitmen, hired and funded one of them, and provided him with information vital to his ability to kill Mr. Owens by savagely pounding his head and brains into a pulp. She then initially denied any murderous intent, and then excused her involvement because "we've just had a bad marriage over the years. . . ." It seems plausible that competent counsel might have believed that the jury would take a less sanguine view of the situation than does the dissent.

* Ms. Owens at trial did not admit to carrying through with the murder plot, a position quite at variance with the hypothesized defense that the deceased (and thus the now legally as well as physically defenseless) Mr. Owens deserved killing.

* Despite the fulminations about the defense knowledge of evidence of savage abuse, that evidence rests wholly on what are said to be Ms. Owens's statements at a pretrial time. In fact, the pre-trial hearing referenced by the dissent at page 22 actually reads:

> Court: you got medical proof?
>
> Mr. Marty: we have *her* proof, your Honor.
>
> Court: Do you have medical proof?
>
> Mr. Marty: No.

Court: Did she seek medical services?

Mr. Marty: No, she did not.

Which is, of course, fully consistent with her contemporaneous statement to the police that "there was very little physical violence." All of the other information as to abuse cited in the dissent at pages 428-30 comes from Gentry's report (not from direct testimony by Owens) generated many years after the trial.

Some attention should be paid to the dissent's extremely vigorous attack, at page 428, on the defense counsel's timekeeping practices, wherein his testimony (see pages 407-08) as to a failure to record (and thus to try to bill for) every second of time spent, when examined many years after the event, is referred to as "ludicrous," and it is said that he "lied to the court" and acted in violation of "his integrity and honesty."

Having examined many vouchers for billing in CJA cases, I believe that it is certainly not unheard of for a counsel to say that he has not billed for all time spent, and thus will take a reduced fee. *Over*-billing is justifiably harshly condemned, but I have never heretofore seen a failure to claim, by contemporaneous records, every second spent attacked in such terms.

CONCLUSION

All three of Owens's habeas claims fail. The judgment of the district court denying her habeas petition is AFFIRMED.

MERRITT, Circuit Judge, dissenting.

The majority opinion slants and misconceives relevant facts and law in this case on each of the three major issues in order to uphold the death penalty. I will try to straighten out the case for the reader by introducing the actual facts and the correct legal principles to be applied. This is not a close case.

The facts about [Ron] Owens' cruel and sadistic behavior toward his wife now make an overwhelming case of domestic violence and psychological abuse in mitigation of the murder case against Gaile Owens. From the beginning, Mrs. Owens' counsel knew that this was her best – indeed, her only – defense. Before trial, her counsel told the trial court that in his opinion: "This case has a meritorious defense in the battered-wife syndrome." (App.120.) The Memphis district attorneys obviously knew that this was the defense theory. But this defense was never developed or even mentioned to the jury during the trial because of the cover-up of exculpatory evidence by the Memphis prosecutor and the complete failure of defense counsel to conduct a proper investigation of [Ron] Owens' sadistic behavior toward his wife. I will discuss the Memphis prosecutor's cover-up of

exculpatory evidence first, then defense counsel's failure to investigate and develop the defense, and finally the refusal of the Memphis trial court to allow in evidence one of the defendant's best lines of mitigation testimony.

I. The State Withheld Crucial Exculpatory Evidence of Mr. Owens' Infidelities

Prior to trial, Mrs. Owens requested that the state prosecutor provide the defense with all information in its possession that her husband "had numerous girlfriends, extra-marital sexual affairs involving unusual sexual proclivities and/or perversions" because "these proclivities, perversions and affairs were flaunted and visited upon defendant with such regularity and in such ways as to contribute to [her] state of mind and mental condition. . . . " (App.101.)[1] The prosecution had found sexually explicit love letters between Mr. Owens and one of his girlfriends, Gayla Scott. In the love letters, the two called each other "fluff licker" and "lollipop," a clear reference to numerous oral sexual experiences between [Ron]

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[1] Obviously my colleagues are in error that Mrs. Owens did not cooperate at all with her lawyer. From these statements in the pleadings, it is clear that she advised her lawyer in detail of her treatment and suspicions and was willing to be of assistance. She fearfully and simply (though mistakenly) said she did not want to testify. The fact that she wanted him to talk to "her grandfather or mother or father," which he failed to do, J.A. 395-96, defeats the majority's claim that she prevented her lawyer from talking to her family or developing the wife-abuse defense.

Owens and Gayla Scott. (App.412-413.) The detectives had written up their discovery of the love letters in a contemporaneous report describing them to the prosecution. The prosecution covered up the love letters while lying to the trial court and to opposing counsel in the following language: "To the best of my knowledge we have shown them every single scintilla of evidence which we seized and which we have that came from the house. Anything that is in the possession of any law enforcement agency we have shown to counsel for the defense." The prosecutor went on to further the cover-up by saying to the trial court and Mrs. Owens that "everything we have in the way of any kind of physical evidence, any piece of paper, any notebook – anything along those lines, letters and etc. that we have, we have made available to them." (App.111-115.) This set of falsehoods is typical of the conduct of the Memphis district attorney's office during this period. *See Cone v. Bell,* 492 F.3d 743, 759 (6th Cir.2007) (Merritt, J., dissenting), *cert. granted,* ___ U.S. ___, 128 S.Ct. 2961, 171 L.Ed.2d 883, 76 U.S.L.W. 3484 (2008).

To the obvious prosecutorial falsehoods in this case, the majority opinion can only lamely answer that Mrs. Owens already knew that her husband, Ron Owens, was having affairs so that any documents and letters would not have been favorable or prejudicial because she herself could have testified to those facts herself. The majority argues that if a defendant has knowledge of any fact, or a reasonable suspicion of a fact, the defendant is not entitled to exculpatory

evidence regarding that fact because she could testify regarding that fact herself. (My colleagues state their proposed rule as follows: "Owens knew of the affair, and if she wanted to present evidence of the affair, she could have testified. . . . She loses because the proof she needed was available elsewhere." Opinion, p. 417.) The majority's proposed rule is nonsense. In *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the defendant, Brady, had knowledge that he did not kill the victim, but had no documentary evidence to support that knowledge or to support his view of the identity of the real culprit. Under the theory of the majority in the instant case, Brady was not entitled to any documentary evidence in the hands of the prosecution that would support any knowledge that Brady already had. Instead, according to the rule announced by my colleagues, Brady should have taken the stand and testified about his knowledge or put the real culprit on the stand and examined him. This argument is directly contrary to the Supreme Court's holding in *Brady.* The Court specifically held that Brady's knowledge that his co-defendant committed the crime obviously did not satisfy the prosecution's responsibility to provide specific information that it had regarding the co-defendant's guilt. *Id.* at 87, 83 S.Ct. 1194.

The prosecution offered Owens life imprisonment (conditioned on the guilty plea of her confederate) because the killing under these mitigating circumstances – circumstances the jury never heard about at all – made her less culpable. The jury never heard

the evidence in the hands of the prosecution that made her less culpable because the prosecution consciously and deliberately covered it up. And now my colleagues say "fine, no problem, she should have taken the stand."

Rather than tell the jury the truth about the matter, the prosecution told the jury that she killed her husband to get "insurance money." (App.151-51.) On this issue, Owens' post-conviction counsel concludes in her reply brief:

> The prosecution's theory, however, would have held no sway had the prosecution complied with its constitutional obligations to disclose the letters between Gala Scott to Ronald Owens. Indeed, had the jury held in their hands the exculpatory pile of letters from Gala Scott, the jury would have seen the circumstances of the offense in a very different light. The jurors would have actually understood the "cruelty" which Gaile Owens said she endured, they would have been sickened by the whole ordeal, and they would have understood the real truth behind what happened to Ronald Owens. With the actual production of the letters, and with those letters being sent back to the jury room, reasonable jurors would have returned the very sentence which the prosecution said was appropriate for Gaile Owens: Life.

(Appellee's Reply Br. 8-9.) This may or may not have been the result of the trial in Memphis, but it is certainly true that the blatant prosecutorial misconduct

suppressing the love letters was highly material and prejudicial at the mitigation phase of the trial. To claim otherwise is to deny the obvious. Note that my colleagues cannot deny that the abused-wife defense was her best defense or that her lawyer offered no proof along this line – in part because the prosecutor covered it up but also because her lawyer did not do his job.

II. Ineffective Assistance of Counsel

My colleagues' proposed disposition of Owens' ineffective assistance of counsel claim is also slanted in favor of the State both as to the facts and the law. Their proposed rule, stated in italics on page 15, is that notwithstanding Owens' strong case of spousal abuse, her ineffective assistance claim based on counsel's failure to investigate and develop the defense fails "because Owens' counsel wanted to present the substance of such evidence directly at trial, through the testimony of Owens and her family." In other words, my colleagues postulate when she told her lawyers she did not want to testify herself, they were justified in completely abandoning her domestic violence and spousal abuse claim – the claim they had earlier told the court was a "meritorious defense." The complete abandonment of that defense left the jury only with the prosecutor's theory that her motive for killing her husband was the "insurance money."

In a long series of cases, the Supreme Court, the Sixth Circuit, and other circuits have held that in

order to comply with the Sixth Amendment, defense counsel in capital cases must at least meet the American Bar Association Guidelines For The Appointment and Performance of Defense Counsel in Death Penalty Cases.[2] Those Guidelines clearly state that defense counsel must fully investigate all mitigating circumstances, even when the defendant does not want to take the stand or is not forthcoming. Section 10.7 on "Investigation" instructs counsel as follows:

> That counsel may not abdicate the duty to investigate simply because the client did not actively support the mitigation case has been supported by the holdings of other circuits, as well. *See Avila v. Galaza*, 297 F.3d 911,

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[2] In addition to the ABA Guidelines, quoted in the text, both the Supreme Court and the Sixth Circuit have held that an obstinate client was no excuse for failing to perform a complete investigation. *See Rompilla v. Beard*, 545 U.S. 374, 381, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (holding that counsel was ineffective for failing to examine the client's court file on a prior conviction despite the fact that the client's "own contributions to any mitigation case were minimal" and the client sent his counsel "off on false leads"); *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir.2005) (quoting *Coleman v. Mitchell*, 268 F.3d 417, 449-50 (6th Cir.2001)) ("[D]efendant resistance to disclosure of information does not excuse counsel's duty to independently investigate."); *Hamblin v. Mitchell*, 354 F.3d 482, 492 (6th Cir.2003) (reversing the district court for stating that counsel cannot be ineffective when counsel is simply following a defendant's wishes not to investigate); *cf. Fautenberry v. Mitchell*, 515 F.3d 614, 650 (6th Cir.2008) (Moore, J., dissenting) (providing a thoroughly researched argument against the majority that counsel's deficiencies should be not excused simply because of the client's uncooperative behavior).

921 (9th Cir.2002) (holding counsel deficient for failing to investigate whether the client's brother was the real shooter despite counsel's belief that such an investigation would have "go[ne] against the wishes of [the client] and his family"); *Blanco v. Singletary,* 943 F.2d 1477, 1501-03 (11th Cir.1991) (holding counsel ineffective for "latching onto" client's assertions that he did not want to call penalty phase witnesses); *Martin v. Maggio,* 711 F.2d 1273, 1280 (5th Cir.1983) (holding that defendant's instruction "that his lawyers obtain an acquittal or the death penalty" did not justify his lawyers' failure to investigate the intoxication defense).

My colleagues grossly misstate the case law on this subject.

Guideline 10.7 Investigation

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

> 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.
>
> . . . .
>
> *Penalty*
>
> Counsel's duty to investigate and present mitigating evidence is now well established. *The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel "sit idly by, thinking that investigation would be futile." Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.*

(Emphasis added.)

The Sixth Amendment requires a comprehensive investigation, as the cases discussed in footnote 2 explain. My colleagues' singular reliance on *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007), for the proposition that counsel could completely abandon investigating and using domestic violence and psychological abuse as "a meritorious defense" demonstrates the majority's effort to alter the governing standard in order to affirm the death

penalty. In *Schriro* the Supreme Court found that the defendant specifically instructed counsel "not to present any mitigating evidence," *id.* at 1941, and thus distinguished *Wiggins v. Smith* and *Rompilla v. Beard*. The Supreme Court distinguished *Wiggins* and *Rompilla* only on the ground that in those cases "the defendant refused to assist in the development of a mitigation case, but did not inform the court [as in *Schriro*] that he did not want mitigating evidence presented." In Gaile Owens' case she did not even refuse to cooperate, much less instruct counsel not to put on mitigating evidence. My colleagues cannot legitimately hide behind the *Schriro* case and use it to construct a rule that counsel can abandon any investigation and development of spousal abuse when the defendant is reticent to take the stand.

Defense counsel's time sheets and his certified representation to the state court showed that counsel abandoned the investigation of the defense – spending a total of only two hours of investigation in preparation for the mitigation or sentencing phase of Mrs. Owens' case. The majority speculation that these statements of defense counsel to the court were false is ludicrous. Counsel was required by law to "certify that the foregoing [two hours of time] represents an accurate and complete statement of time and expense in connection with the above action." (App.251-59.) The majority's assumption that counsel lied to the court in a written certification and in fact spent long hours of investigation for the sentencing hearing is inexplicable. Counsel had no incentive to falsify his

investigation and every reason to tell the truth. His pay depended upon the hours of investigation spent, and his integrity and honesty depended upon his telling the truth.

Had counsel performed a full and complete investigation as required by the ABA standard quoted above and adopted by the Supreme Court, here is the evidence that counsel would have found and could have presented to the jury:

> Ron Owens was abusive toward Ms. Owens. He subjected her to physical, emotional, and sexual abuse beginning with their wedding night when he was forceful and impatient, demanding sex immediately upon entering their hotel room. When Ms. Owens revealed to her new husband that she was in great pain and bleeding profusely, he called her frigid, and angrily left the hotel room stating that "If you won't, I know where I can find someone who will." R. 17, Addendum 12: PCR, Vol. 7, Ex. R, pp. 9-10; Apx. pp. 340-341.
>
> Ron Owens inserted large objects into Ms. Owens's vagina and rectum, causing her pain and bleeding. At one point, Mr. Owens inserted a wine bottle into Ms. Owens's vagina and manipulated it with such vigor that it broke inside her. *Id.,* Ex. R., p. 10; Apx. p. 341. Mr. Owens also used a penis-shaped marijuana pipe to penetrate Ms. Owens's vagina which caused her pain and humiliation. *Id.,* Ex. R., p. 10; Apx. p. 341.

Ron Owens's sexually abusive behavior not only placed Ms. Owens at risk, but also risked the life of their unborn son. The night before the birth of her second son, Ron Owens forced Ms. Owens to engage in such brutal sexual intercourse that Ms. Owens's placenta partially detached, requiring an emergency C-section to save Ms. Owens and her son. *Id.,* Ex. R. p. 14; Apx. p. 345; *Id.,* Ex. 1, p. 32; Apx. p. 285.

Ron Owens not only sexually abused Ms. Owens, but was also emotionally abusive toward her. Upon the birth of her children, Mr. Owens accused Ms. Owens of not taking properly her birth control pills and complained that the children would be an unbearable financial burden. *Id.,* Ex. R, pp. 13-14; Apx. pp. 344-345. In addition, Mr. Owens regularly berated Ms. Owens telling her, among other things, that "she did not sweat much for a fat person." *Id.,* Ex. R, pp. 10-11; Apx. pp. 341-342.

Ron Owens was also deceitful and unfaithful to Ms. Owens. Mr. Owens had lied to Ms. Owens and to others about his background, falsely claiming that he volunteered to serve as a medic in Vietnam, and that he was shot twice and contacted Malaria while in Vietnam. *Id.,* Ex. R., pp. 11-12; Apx. pp. 342-343; *Id.,* Ex. N; Apx. p. 293; *Id.,* Ex. Q; Apx. p. 328. Moreover, Mr. Owens had lied about his credentials on a job application at Baptist Hospital, stating that he had a B.S. degree

> when he did not. *Id.*, Ex. R, p. 12; Apx. p. 343; *Id.*, Ex. O; Apx. p. 311.

(Final Brief of Appellant filed August 3, 2007, 11-13.) The incompetence of defense counsel in this case is well illustrated by Mr. Marty's post-trial excuse that he thought investigating and showing spousal abuse would have made the jury more likely to favor capital punishment. He testified:

> Q. Mr. Marty, going back to an earlier question concerning, for instance, the report by K.D. Wray concerning the verification of an affair, sexual affair with Ron Owens, do you think that would have been important knowledge for you to have in this case?
>
> A. It may or may not have been. It may have given her a motive to kill him.
>
> Q. Do you think it might have been useful in sentencing, perhaps, to give the jury a reason not to kill her?
>
> A. *It may have given them* [the jury] *a stronger reason to kill her.*

(Emphasis added.) Post-conviction counsel's answer to Marty's excuse for abandoning the investigation and offering no proof of domestic abuse is unanswerable:

> [T]his killing was not worthy of the death penalty. That is the reason why the prosecution offered Gaile Owens a life sentence in the first place: A woman who kills her husband because of an affair is less culpable

> than other murderers. In fact, case law is replete with circumstances in which the unfaithfulness of a spouse – even if not providing a legal justification for the killing – has reduced the killing to something less than a death penalty case.[22] One can easily understand how a woman who has been cheated on, beaten, and emotionally and/or sexually abused might kill her husband and why life in prison – not death – is the appropriate sentence under the circumstances.[3]

(Final Reply Brief of Appellant filed August 7, 2007, 6-7.)

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[2] *See, e.g., State v. Thornton,* 730 S.W.2d 309 (Tenn.1987); *Whitsett v. State,* 201 Tenn. 317, 299 S.W.2d 2 (1957); *Drye v. State,* 181 Tenn. 637, 184 S.W.2d 10 (1944); *State v. Reagan,* No. M2002-01472-CCA123-CD, 2004 WL 1114588 (Tenn.Crim. May 19, 2004); *State v. McCarver,* No. M2002-00123-CCA-R3-CD (Tenn.Crim.App. Jan.26, 2004); *State v. Belcher,* No. 03C01-9608CC00299, 1987 WL 749392 (Tenn.Crim.App. Nov.26, 1987); *People v. Buggs,* 112 Ill.2d 284, 97 Ill.Dec. 669, 493 N.E.2d 332 (1986); *People v. Carlson,* 79 Ill.2d 564, 38 Ill.Dec. 809, 404 N.E.2d 233 (1980).

[3] Indeed, even this month in West Tennessee, defendant Mary Winkler was sentenced to three years in prison after being found guilty of shooting her husband in the back while her children were present in their home. Much like Mrs. Owens's allegations of sexual, physical, and emotional abuse, Ms. Winkler claimed that she was physically and emotionally abused by her husband, that he was sexually inappropriate, and that she was hiding her financial troubles from him. *See* http://www.cnn.com/2007/LAW/06/08/winkler.sentence.ap/index.html, last visited June 14, 2007. *See generally,* Note, *Developments in the Law: Legal Responses to Domestic Violence, Battered Women Who Kill Their Abusers,* 106 Harv. L.Rev. 1574 (1993).

To make matters even worse, Mrs. Owens' appointed counsel each thought the other was responsible for conducting the sentencing hearing; consequently, neither prepared for it. (App.387, 411.) As a result, counsel were so ill prepared that when Dr. Max West, a psychiatrist who had interviewed Mrs. Owens years earlier, began to testify about her family history, defense counsel failed to understand that the Tennessee capital sentencing statute, T.C.A. § 39-2-203(c) (now repealed), expressly made such hearsay testimony admissible at the mitigation hearing. As a result, counsel failed to point out the statute to the trial court when the prosecutor objected on hearsay grounds. The state court erroneously ruled the testimony inadmissible when defense counsel let the objection go unanswered.

Defense counsel also failed to follow the provisions of Tennessee law that would have allowed him to hire a psychologist or psychiatrist to testify that Mrs. Owens was suffering from the recognized personality disorder of "battered wife syndrome." *See* Note, *Developments in the Law: Legal Response to Domestic Violence, Battered Women Who Kill Their Husbands,* 106 Harv. L.Rev. 1574-1597 (1993). The record now contains extensive testimony from an expert in the field showing that the traumatic treatment Mrs. Owens experienced in childhood and as the wife of a sadistic husband created an intense anxiety disorder resulting in impulsive actions in conflict with her core values and beliefs. Her mental disorder includes physical manifestations such as an

eating disorder causing her weight to fluctuate drastically from 100 to 170 pounds.

As a result of defense counsel's failures, the jury heard nothing, not a stitch, of Mrs. Owens' family history or the sadistic treatment she received at the hands of her husband. The fact that Mrs. Owens was so ashamed of her past that she did not want to take the stand and testify in no way excuses counsel's failure to investigate and prepare for the mitigation hearing or counsel's incompetent failure to cite the law allowing hearsay testimony in such hearings. Counsel obviously had no comprehension of the law governing sentencing hearings, did nothing to investigate mitigating facts, abandoned Owens' best defense and did not prepare at all for the sentencing hearing. If that is not ineffective assistance of counsel in a capital case, there is no such thing as ineffective assistance of counsel.

III. The State Violated Owens' Right to Prove Mitigating Factors at the Capital Sentencing Hearing

The majority opinion repeatedly refers to Owens' offer of proof as an offer of "failed plea negotiations" and mistakenly concludes that such "failed plea negotiations" cannot constitute "mitigating evidence" within the rule allowing "any relevant mitigating evidence," established in *Eddings v. Oklahoma,* 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In fact, the prosecutor argued to the jury that Owens

"deserved" the death penalty because she did not acknowledge and repent her murderous criminal behavior. Owens wanted to show that this was untrue because she had, in fact, offered to plead guilty and because the prosecutor's offer of life imprisonment was itself an admission that Owens did not "deserve" the death penalty. Thus, both her offer to plead and the prosecutor's offer of life were directly inconsistent with the prosecutor's later claim to the trial jury that she "deserved" death because she was impenitent and hard of heart. What we have here is death penalty gamesmanship on the part of the prosecution, and the jury was entitled to know what was going on. This should not be a hard concept for my colleagues to grasp.

The majority offers a hopeless, out-of-the question argument on this subject of acceptance of responsibility. The opinion says in the first paragraph of Section V.C that "Owens's proffered evidence shows no such acceptance" because she was willing to plead "only if guaranteed a life sentence" rather than "the electric chair." The majority suggests that the evidence would have been admissible and "persuasive as a mitigating factor" if she had pled guilty and accepted "the electric chair." The argument comes down to this: If Gail Owens had volunteered for "the electric chair," the "proffered evidence would show acceptance" and would have met the test of "relevant mitigating evidence" under *Eddings,* but not otherwise. My colleagues' view is that Mrs. Owens could only make her evidence of remorse and acceptance of

responsibility admissible by following the Mosaic law of *lex talionis* – "an eye for an eye, a tooth for a tooth." Surely the law of admissibility of mitigating evidence in our time under *Eddings* does not turn on accepting the theory of Mosaic law as found in the Old Testament.

The law is not unclear or up-in-the-air on this subject. *Eddings* is good law, and under *Eddings* Owens is entitled to prove "any relevant mitigating evidence." Contrary to the majority's argument that her offer to plead "shows no such acceptance" of responsibility, the opposite is true. Had Owens' proof of her offer to plead guilty and the prosecution's offer of life been admitted, the jury might well have concluded that the prosecution's claim that she was remorseless and deserved death was false and that Owens' life should be spared. As with the *Brady* violation and the ineffective assistance of counsel, the majority has again stood truth on its head with its argument that Owens' offer to plead and the State's offer of life does not fall within the meaning of "any relevant mitigating evidence."

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION**

GAILE K. OWENS, Petitioner, v. **EARLINE GUIDA**, WARDEN, Tennessee Prison For Women, Respondent.	)	No. **2:00-2765-Br**

**ORDER GRANTING IN PART
RESPONDENT'S FIRST MOTION
FOR PARTIAL SUMMARY JUDGMENT**

(Filed Jun. 23, 2005)

The Petitioner, Gaile K. Owens, an inmate at the Tennessee Prison For Women in Nashville, Tennessee, filed an application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging the jury's imposition of a sentence of death for the crime of accessory before the fact to first degree murder.[1] The Respondent, Earline Guida, warden at the prison, filed a motion for summary judgment asserting that

[1] Petitioner does not dispute her conviction for the offense of accessory before the fact to first degree murder. In the instant petition for writ of habeas corpus relief, she only challenges the sentence of death imposed for the offense.

Petitioner's claims are procedurally defaulted and/or are without merit. The Court will address each of Petitioner's claims individually[2].

I. FACTUAL BACKGROUND

In 1986, Petitioner was tried in a Tennessee state court for the murder of her husband, Ronald Owens.[3] The jury convicted her of accessory before the fact to first degree murder for which she received a sentence of death. *State v. Porterfield,* 746 S.W.2d 441, 443-444 (Tenn. 1988).

The evidence at trial established that prior to Mr. Owens' murder, over the course of several months, Petitioner solicited several men, including Sidney Porterfield and George James, to kill her husband. *Id.* at 444. Porterfield was eventually hired by Owens to kill her husband. She met with Porterfield on at least three occasions, the last being at 2:30 pm on Sunday, February 17, 1985. *Id.* At that meeting, Petitioner

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[2] The warden's motion for summary judgment as to Claims 19 and 21, ¶ 177, is substantially affected by recent rulings of the United States Court of Appeals for the Sixth Circuit and the United States Supreme Court in *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004) *rev'd* ___ U.S. ___ (2005), 125 S.Ct. 847 (per curiam), and is addressed in a previous order entered by the Court. *See Owens v. Guida,* case no. 00-2765, Order Granting In Part Respondent's First Motion For Partial Summary Judgment And Denying Petitioner's Motion For Partial Summary Judgment, dkt. no. 77, March 24, 2005 ("*Owens* Order I").

[3] Petitioner was tried jointly with co-defendant Sidney Porterfield.

told Porterfield that her husband would either be at home alone or at the church playing basketball on Sunday evening. Porterfield attacked the deceased at his home, on the evening of February 17, 1985, striking him over the head more than twenty-one times with a blunt object. *Id.*

On the same evening as the murder, Mr. and Mrs. Owens and their two sons attended church services. After church, when Mr. Owens remained to play basketball, the children asked to stay and play as they usually did. Mrs. Owens refused to let them stay, however, and took them instead to a restaurant for dinner and then to the home of her sister, Carolyn Hensley. They remained there until approximately 10:30 pm at which time they went home. *Id.*

Upon arriving at the home around 11:00 pm, the Petitioner and her children found Mr. Owens' unoccupied car in the driveway with the door open. The back door to the house was likewise partially open, and Mr. Owens' keys were in the lock. In the kitchen, there were signs of a struggle, and blood was splattered on the wall and floor. The boys and Petitioner discovered Mr. Owens lying in the den unconscious with blood covering his head. *Id.*

After the murder, James contacted the police and told them that the Petitioner had solicited him to kill Mr. Owens. James then assisted the police by contacting and eventually meeting with her. In their conversation, Mrs. Owens told James, who was wearing a hidden tape recorder, that she had her husband

killed because of "bad marital problems." In order to keep him quiet, the Petitioner paid James sixty dollars. At the conclusion of the meeting, the police arrested Mrs. Owens. *Id.*

Initially, Petitioner told the police that she had only hired people to rough up her husband. Later, she confessed to offering three men money to kill him. When asked by the police why she had him killed, Petitioner stated, "[W]e've just had a bad marriage over the years, and I just felt like he had, mentally I just felt like he had been cruel to me. There was very little physical violence." *Id.*

The police also arrested Porterfield, who confirmed that he had met with the Petitioner and that she had offered to pay him $17,000 to kill her husband. He admitted getting into an altercation with the deceased, at which time Porterfield hit Mr. Owens in the head with a tire iron multiple times. Porterfield maintained, however, that he was at the home solely to check out the situation, that the deal with Petitioner was not completed, and that he struck the victim only to prevent him from turning Porterfield over to the police. *Id.* at 445.

Petitioner did not testify at trial. In her defense, Mrs. Owens presented the testimony of a neighbor who testified as to Petitioner's mental state upon finding her husband, and a funeral home employee who stated that Petitioner owed money for the deceased's funeral bill, as she had represented to her father-in-law in attempting to secure a loan after her

husband's death. Presumably, Mrs. Owens offered this testimony to show that she had legitimate debts to pay, rather than requiring money to supplement or replenish the money she had allegedly spent in procuring her husband's murder. *Id.*

On January 14, 1986, the jury found Petitioner guilty of accessory before the fact to first degree murder and Porterfield guilty of first degree murder. At the sentencing hearing, Mrs. Owens called as witnesses Dr. Max West, a psychiatrist who had examined her on one occasion years earlier, and two jail employees, one of whom was Elizabeth Bratcher. *Id.* at 448; Add. 4, vol. 13 at 1902-1911. Despite the mitigation evidence presented by Mrs. Owens, the jury sentenced her to death. In support of the sentence, the jury found the existence of two of the statutory aggravating factors: 1) Petitioner committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration, or the promise of remuneration; and 2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. *Porterfield,* 746 S.W.2d at 448-449; Tenn. Code Ann. § 39-2-203(i)(4 & 5) (1982).

II. PROCEDURAL BACKGROUND

Petitioner appealed her conviction and sentence asserting various grounds for relief.[4] The Tennessee Supreme Court affirmed Owens' conviction and sentence in *State v. Porterfield,* 746 S.W.2d 441 (Tenn. 1988), and the United States Supreme Court denied her subsequent petition for writ of certiorari. *See Porterfield v. Tennessee,* 486 U.S. 1017 (1988).

On February 28, 1991, Owens filed a petition for post-conviction relief which was denied and included an ex parte request for expert services. On interlocutory appeal to the Tennessee Supreme Court, Petitioner was granted the funds for expert services. *See Owens v. State,* 908 S.W.2d 923 (Tenn. 1995). She then filed an amended post-conviction petition on August 15, 1996, which was also denied. The Tennessee Court of Criminal Appeals affirmed the denial, *see Owens v. State,* 13 S.W.3d 742 (Tenn. Crim. App.

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[4] On direct appeal, Owens asserted error based on 1) the trial court's refusal to sever Petitioner's case from Porterfield's, 2) the trial court's ruling that Petitioner could not present evidence of her willingness to plead guilty in return for a life sentence, 3) the trial court's rulings during voir dire, 4) the trial court's admission of certain evidence, including the introduction at the sentencing hearing of two photographs of the victim, 5) the State's failure to give the required notice of the aggravating circumstances it intended to rely upon during the sentencing phase, 6) arguments made by the State to the jury, 7) the guilt and sentencing instructions given to the jury; and 8) the constitutionality of the sentencing provisions of the Tennessee Death Penalty Act, Tenn. Code Ann. § 39-2-203.

1999),[5] and the Tennessee Supreme Court refused to consider Petitioner's application for appeal. On August 23, 2000, Owens filed the instant petition for writ of habeas corpus.

III. LEGAL STANDARDS APPLICABLE TO HABEAS PETITIONS

A. Waiver and Procedural Default

Twenty-eight U.S.C. § 2254(b) states, in pertinent part:

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

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[5] Among the issues raised in the Tennessee Court of Criminal Appeals were whether 1) Petitioner received ineffective assistance of counsel at trial; 2) the post-conviction judge should have recused himself; 3) Petitioner's constitutional rights were violated during the guilt and sentencing phases by the prosecution's failure to provide the defense with exculpatory evidence; 4) the heinous, atrocious, and cruel aggravator was appropriately applied vicariously to Petitioner and whether the trial court should have instructed the jury that Petitioner had to intend to inflict the heinous, atrocious, and cruel act; 5) the murder for remuneration aggravator sufficiently narrowed the class of death eligible offenders; 6) the reasonable doubt jury instructions given at both stages of the trial were constitutional; and 7) the Tennessee death penalty statute is constitutional.

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

Thus, a habeas petitioner must first exhaust available state remedies before requesting relief under § 2254. *See e.g., Granberry v. Greer,* 481 U.S. 129, 133-34 (1987); *Rose v. Lundy,* 455 U.S. 509, 519 (1982); Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner has failed to exhaust her available state remedies if she has the opportunity to raise her claim by any available state procedure. 28 U.S.C. § 2254(c); *Preiser v. Rodriguez,* 411 U.S. 475, 477, 489-90 (1973).

To exhaust her state remedies, the petitioner must have presented the very issue on which she seeks relief from the federal courts to the courts of the state that she claims is wrongfully confining her. *Picard v. Connor,* 404 U.S. 270, 275-76 (1971); *Rust v Zent,* 17 F.3d 155, 160 (6th Cir. 1994). "[A] claim for relief in habeas corpus must include reference to a

specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief." *Gray v. Netherland,* 518 U.S. 152, 162-63 (1996). "'[T]he substance of a federal habeas corpus claim must first be presented to the state courts.'" *Id.* at 163 (quoting *Picard,* 404 U.S. at 278). A habeas petitioner does not satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." *Id.*

In addition, "[i]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* A state defendant may be deemed to have "fairly presented" a claim to the state courts if she (1) relied upon federal cases employing constitutional analysis; (2) relied upon state cases employing federal constitutional analysis; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law. *Franklin v. Rose,* 811 F.2d 322, 326 (6th Cir. 1987). When a petitioner raises different factual issues under the same legal theory, she is required to present each factual claim to the highest state court in order to exhaust her state remedies. *O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999); *see also Pillette v. Foltz,* 824 F.2d 494, 496 (6th Cir. 1987). A petitioner has not exhausted her state remedies if she has merely presented a particular legal theory to the courts without presenting

each factual claim. *Pillette,* 824 F.2d at 497-98. Each claim must be presented to the state courts as a matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless,* 459 U.S. 4, 6 (1982); *see also Duncan v. Henry,* 513 U.S. 364, 366 (1995) (per curiam) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.").

Moreover, the state court decision must rest primarily on federal law. *Coleman v. Thompson,* 501 U.S. 722, 734-35 (1991). If the state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, a petitioner ordinarily is barred by this procedural default from seeking federal habeas review. *Wainwright v. Sykes,* 433 U.S. 72, 87-88 (1977). "Procedural default does not bar consideration[,] [however,] of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed,* 489 U.S. 255, 263 (1989) (citations and internal quotations omitted). Furthermore, the state-court decision need not explicitly address the federal claims; instead, it is enough that the petitioner's brief squarely presents

the issue. *Smith v. Digmon,* 434 U.S. 332 (1978) (per curiam).

When a petitioner's claims have never been actually presented to the state courts but a state procedural rule prohibits the state court from extending further consideration to them, the claims are deemed exhausted, but procedurally barred. *Coleman,* 501 U.S. at 752-53; *Teague v. Lane,* 489 U.S. 288, 297-99 (1989); *Wainwright,* 433 U.S. at 87-88; *Rust*, 17 F.3d at 160.

A petitioner confronted with either variety of procedural default must show cause for the default and prejudice to obtain federal court review of his claim. *Teague,* 489 U.S. at 297-99; *Wainwright,* 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman,* 501 U.S. at 752-53; *Murray v. Carrier,* 477 U.S. 478, 488 (1986).

An ineffective assistance of counsel claim may establish cause for the procedural default. *Edwards v. Carpenter,* 529 U.S. 446, 453 (2000). The ineffective assistance of counsel claim relied upon to establish cause, however, must not have been procedurally defaulted. *Id.* If the ineffective assistance of counsel claim was procedurally defaulted, the default may also be excused if the defendant can establish cause and prejudice as to that claim. *Id.*

A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman,* 501 U.S. at 750. The petitioner must show that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup v. Delo,* 513 U.S. 298, 327 (1995) (quoting *Murray,* 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted [her] in the light of the new evidence." *Id.*

Tennessee's post-conviction statute, the Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101 to -122, specifies types of procedural default that may bar a state court from reviewing the merits of a constitutional claim. A one-year statute of limitations governs the filing of petitions under that statute. *Id.* at § 40-30-102. The Sixth Circuit has upheld the dismissal of a Tennessee prisoner's habeas petition as barred by a procedural default caused by failing to file within the Tennessee statute of limitations on post-conviction relief. *Hannah v. Conley,* 49 F.3d 1193, 1194-95 (6th Cir. 1995) (construing Tenn. Code Ann. § 40-30-102 and finding that the language of the statute is "mandatory").

B. Legal Standard for Merits Review

The standard for reviewing constitutional claims on their merits in a suit for habeas relief is set forth in 28 U.S.C. § 2254(d). The section provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This Court must determine, therefore, whether the state court adjudications of those claims presented were either "contrary to" or an "unreasonable application of" "clearly established" federal law as determined by the United States Supreme Court. This Court must also determine whether the state court decisions were based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding.

1. § 2254(d)(1)

The Supreme Court has issued a series of decisions setting forth the standards for applying § 2254(d)(1). In *(Terry) Williams v. Taylor,* 529 U.S. 362, 404 (2000), the Court emphasized that the "contrary to" and "unreasonable application of" clauses should be accorded independent meaning. A state-court decision may be found to violate the "contrary to" clause under two circumstances:

> [1] A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . [and] [2] A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

Id. at 405-06 (citations omitted); *see also Price v. Vincent,* 538 U.S. 634, 640 (2003); *Lockyer v. Andrade,* 538 U.S. 63, 71-72 (2003); and *Bell v. Cone,* 535 U.S. 685, 694 (2002).[6] The Supreme Court has emphasized

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[6] The Supreme Court has emphasized that this standard "does not require citation of our cases-indeed, it does not even

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the narrow scope of the "contrary to" clause, explaining that "a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams,* 529 U.S. at 406; *see also id.* at 407 ("If a federal habeas court can, under the 'contrary to' clause, issue the writ whenever it concludes that the state court's *application* of clearly established federal law was incorrect, the 'unreasonable application' test becomes a nullity.") (emphasis in original).

A federal court may grant the writ under the "unreasonable application" clause "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." *Cone,* 535 U.S. at 694; *see also Andrade,* 538 U.S. at 75; *Williams,* 529 U.S. at 409.[7] "[A]n unreasonable application of

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require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer,* 537 U.S. 3, 8 (2002) (per curiam) (emphasis in original).

[7] Although the Supreme Court in *Williams* recognized, *in dicta,* the possibility that a state-court decision could be found to violate the "unreasonable application" clause when "the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply," 529 U.S. at 407, the Court expressed a concern that "the classification does have some problems of precision," *id* at 408. The *Williams* Court concluded that it was not necessary "to decide how such 'extension of legal principle'

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federal law is different from an incorrect application of federal law." *Williams*, 529 U.S. at 410.[8] "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

Finally, § 2254(d)(1) refers to "clearly established" federal law, "as determined by the Supreme Court of the United States." This provision "expressly

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cases should be treated under § 2254(d)(1)," *id.* at 408-09, and, to date, the Supreme Court has not had occasion to revisit the issue. *See Williams v. Coyle*, 260 F.3d 684, 699-700 (6th Cir. 2001).

[8] *See also Andrade*, 538 U.S. at 75 (lower court erred by equating "objectively unreasonable" with "clear error"; "These two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."); *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam) (holding that the lower court "did not observe this distinction [between an incorrect and an unreasonable application of federal law], but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)."); *Cone*, 535 U.S. at 698-99 ("For [a habeas petitioner] to succeed . . . , he must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly."); *Williams*, 529 U.S. at 411 ("Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

limits the source of law to cases decided by the United States Supreme Court." *Harris v. Stovall,* 212 F.3d 940, 944 (6th Cir. 2000). As the Sixth Circuit explained:

> This provision marks a significant change from the previous language by referring only to law determined by the Supreme Court. A district court or court of appeals no longer can look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.

Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir. 1999) (citing 17A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4261.1 (2d ed. Supp. 1998)); *see also Harris,* 212 F.3d at 944 ("It was error for the district court to rely on authority other than that of the Supreme Court of the United States in its analysis under § 2254(d)."). In determining whether a rule is "clearly established," a habeas court is entitled to rely on "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams,* 529 U.S. at 412.

2. § 2254(d)(2)

There is scant case law about the standards for applying § 2254(d)(2), which permits federal courts to grant writs of habeas corpus where the state court's adjudication of a petitioner's claim "resulted in a decision that was based on an unreasonable determination

of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The few decisions interpreting this provision have attempted to incorporate the standards applicable to the "unreasonable application" prong of § 2254(d)(1). Thus, the Sixth Circuit stated, in an unpublished decision, that

> a federal habeas court may not grant habeas relief under § 2254(d)(2) simply because the court disagrees with a state trial court's factual determination. Such relief may only be granted if the state court's factual determination was "objectively unreasonable" in light of the evidence presented in the state court proceedings. Moreover . . . , the state court's factual determinations are entitled to a presumption of correctness, which is rebuttable only by clear and convincing evidence.

Young v. Hofbauer, 52 Fed. Appx. 234, 236 (6th Cir. Dec. 2, 2002) (citing 28 U.S.C. § 2254(e)(1)); *see also Sumner v. Mata,* 449 U.S. 539, 546-47 (1981) (applying presumption of correctness to factual determinations of state appellate courts); *Stanley v. Lazaroff,* 82 Fed. Appx. 407, 416 (6th Cir. Oct. 3, 2003); *Jackson v. Holland,* 80 Fed. Appx. 392, 400 (6th Cir. Aug. 21, 2003) rev'd. ___ U.S. ___, 124 S.Ct. 2736 (2004) ("Though the Supreme Court has not yet interpreted the 'unreasonable determination' clause of § 2254(d)(2), based upon the reasoning in *Williams,* it appears that a court may grant the writ if the state court's decision is based on an objectively unreasonable

determination of the facts in light of the evidence presented during the state court proceeding.") (citing *Torres v. Prunty*, 223 F.3d 1103, 1107-08 (9th Cir. 2000)).

IV. ANALYSIS

A. Procedural Default Of Petitioner's Claim

Respondent asserts that many of Petitioner's claims are procedurally defaulted.[9] In response, Petitioner has offered various arguments to explain why these claims are not procedurally defaulted. Two of Owens' arguments in favor of excusing and/or not finding procedural default are general in nature and are used by her in response to many of Respondent's claims of procedural default. These arguments are that 1) the Tennessee Supreme Court stated that it considered "the entire record . . . [and determined] that no reversible error was committed in either the

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[9] Among the claims that Respondent asserts are procedurally defaulted are: Claim 1 – ¶ 35 (a)-(b), ¶ 36, ¶ 37 (a), ¶ 38, ¶ 39 (a)-(w), (y), (z), (aa), (ff)-(gg), (ii), (kk), (ll)-(oo), (ss)-(ww), ¶¶ 43-48; Claim 3 – ¶¶ 71-74, 76; Claim 4 – ¶¶ 77-83; Claim 5 – ¶¶ 84-89; Claim 6 – ¶¶ 90-95; Claim 7 – ¶¶ 96-106; Claim 8 – ¶¶ 107-09; Claim 9 – ¶¶ 110-11; Claim 10 – ¶ 112; Claim 11 – ¶ 113; Claim 12 – ¶¶ 114-24; Claim 13 – ¶¶ 125-27; Claim 14 – ¶¶ 129-30; Claim 15 – ¶¶ 138-44, 146-47; Claim 16 – ¶¶ 148-53; Claim 17 – ¶¶ 154-57; Claim 18 – ¶¶ 162-65; Claim 19 – ¶¶ 166, 169; Claim 20 – ¶¶ 172-76; Claim 21 – ¶¶ 177-79; Claim 22 – ¶¶ 180-81; Claim 23 – ¶¶ 183-84; Claim 24 – ¶¶ 185-201; Claim 25 – ¶¶ 202-204; and Claim 26 – ¶ 205.

guilt or sentencing phase of the trial", and 2) the Tennessee Supreme Court reviewed the entire record for fundamental error pursuant to Tenn. R. App. P. 52. *See* Petitioner's Response to Respondent's Motion for Summary Judgment at 85-89. Because Petitioner used these arguments to overcome Respondent's assertion of procedural default of many of Petitioner's habeas claims, the Court will address these contentions generally.

Petitioner insists that her claims were exhausted because the Tennessee Supreme Court "implicitly reviewed" issues in addition to those raised by Porterfield and Owens on direct appeal based on the court's statement that "[a]fter consideration of the several issues and of the entire record, we are of the opinion that no reversible error was committed in either the guilt or sentencing phase of the trial. . . ." *Porterfield*, 746 S.W.2d at 444. Furthermore, Petitioner maintains that this Court may review claims, which were not specifically raised in the state courts, because the Tennessee Supreme Court "implicitly" considered the merits of these claims in the course of performing its required fundamental error review pursuant to Tenn. R. App. P. 52.

In *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), the Sixth Circuit expressed reservations with "implicit review" arguments such as those offered by Petitioner. *See Coe*, 161 F.3d at 336. The *Coe* court considered the "implicit review" argument in the context of a challenge to jury instructions on unanimity in sentencing in a death penalty case in a Tennessee

court. *Id.* at 336. The appellate court stated that the argument that "the [Tennessee] supreme court has to review significant errors, whether or not they were raised by the defendant," is "too broad, as it would eliminate the entire doctrine of procedural bar in Tennessee in capital cases." *Id. Coe* recognized, however, that Tennessee courts had been somewhat receptive to the implicit review theory. *See Cone,* 359 F.3d 785. Based on *State v. Martin,* 702 S.W.2d 560 (Tenn. 1985), *overruled on other grounds by State v. Brown,* 836 S.W.2d 530 (Tenn. 1992), in which the Tennessee Supreme Court stated that it was "required by statute to review the sentence and to consider significant errors whether or not called to the attention of the trial court[,]" the *Coe* court explained that a procedural default could not arise under Tennessee law when a capital defendant raised an issue on appeal which he had failed to preserve properly during trial. *Coe*, 161 F.3d at 336. Thus, *Coe* adopted the implicit review theory, but only to the extent that the issues were explicitly raised on appeal, even though not properly preserved in the trial court. *See Cone*, 359 F.3d at 791.

The Sixth Circuit in *Cone* considered whether the petitioner had procedurally defaulted his claim that the application of Tennessee's heinous, atrocious, and cruel ("HAC") aggravator in a capital case resulted in the arbitrary imposition of the death penalty in violation of the Eighth Amendment, by failing to raise the issue on direct appeal. *Id.* The court determined that the petitioner did not procedurally default the

claim by failing to raise it on direct appeal because the Tennessee Supreme Court implicitly reviewed the HAC aggravator issue in the course of its mandatory review. *Id.* This determination by the Sixth Circuit was based on Tenn. Code Ann. § 39-2-205(c) which requires the Tennessee Supreme Court in death penalty cases to conduct a mandatory death penalty review to determine whether:

> (1) The sentence of death was imposed in any arbitrary fashion;
>
> (2) The evidence supports the jury's findings of a statutory aggravating circumstance or statutory aggravating circumstances;
>
> (3) The evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found; and
>
> (4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

Id. (quoting Tenn. Code Ann. § 39-2-205(c) (1982) (current version at Tenn. Code Ann. § 39-13-206(c)(1) (2003)). The *Cone* Court concluded that the law in Tennessee is such that "the supreme court 'implicitly' reviews death sentences for arbitrariness, even if the issue is not explicitly raised on direct appeal. . . ." In so ruling, however, the court noted that

> the implicit review doctrine . . . does not foreclose the possibility that other death penalty defendants may procedurally default on other constitutional issues not raised on direct appeal. The language of Tennessee's mandatory review statute provides a basis to distinguish between vagueness challenges and other constitutional claims, since it requires the Tennessee Supreme Court to look specifically for sentences "imposed in any arbitrary fashion."

Id. Therefore, the court limited its holding concerning implicit review by the Tennessee Supreme Court to claims that minimize the risk of wholly arbitrary and capricious action. *Id.* (stating that "[b]ecause there are other constitutional violations that do not pose this same risk, the implicit review principle we have applied today would not necessarily save those claims from procedural default.").

This Court concludes, based on *Coe* and *Cone*, that Petitioner's arguments that her claims are not procedurally barred based on 1) the Tennessee Supreme Court's statement that "[a]fter consideration of the several issues and of the entire record, we are of the opinion that no reversible error was committed in either the guilt or sentencing phase of the trial . . . ," and 2) the Tennessee Supreme Court's implicit consideration of the merits of these claims in the course of performing its required fundamental error review pursuant to Tenn. R. App. P. 52, are not meritorious except with respect to Claim 19, ¶¶ 166-69, and Claim 20, ¶ 177. Claim 19, ¶¶ 166-69, and Claim 20,

¶ 177, challenge respectively whether the Murder For Remuneration ("MFR") aggravator and the HAC aggravator as applied to Petitioner were appropriate narrowing instructions, i.e., whether her sentence of death was arbitrary based on the application of the MFR and HAC aggravators. The remainder of the claims that Petitioner asserts were not procedurally defaulted based on the Tennessee Supreme Court's implicit review are alleged constitutional violations that do not pose the risk of arbitrary and capricious action, and as such, are not saved from procedural default based on *Cone* and *Coe*. These claims include Claims 3, 5-11, 13-18, and 21-23. The Court finds therefore that Petitioner has not procedurally defaulted Claim 19, ¶¶ 166-69, and Claim 20, ¶ 177. The Court will address Respondent's remaining assertions of procedural default in the analysis of her individual claims.

B. Claim 1 – Ineffective Assistance Of Counsel

Petitioner asserts that she received ineffective assistance of counsel during the sentencing stage of her trial. She maintains that her trial counsel failed to 1) investigate mitigating evidence, 2) obtain expert services, and 3) overcome the State's hearsay objections at the sentencing hearing. The Court will address individually each of Petitioner's claims.

1. Testimony Offered At Post-Conviction Hearing

Attorneys James Marty and Brett Stein represented Ms. Owens at trial.[10] Marty was appointed as counsel for Ms. Owens in May 1985, and the trial began in January 1986. *See* Addendum 13 at 20. Marty's testimony at the post-conviction hearing indicated that he recalled very little of the work he did in the case. *Id.* at 17-111. He testified that he began practicing law in 1971, and at the time of Petitioner's trial in 1986, his practice was ninety-percent criminal. *Id.* Marty had served previously as lead counsel in three or four capital trials. *Id.*

Marty testified that he and Mr. Stein had interviewed numerous witnesses, however, he was unable to recall their names or the subject matter of their conversations. *Id.* at 37. He further stated that his records likely did not include all of the witnesses he interviewed. *Id.* Marty seemed to remember, however, that Ms. Owens instructed him that she did not want him to interview her children nor were they to be involved with the trial. *Id.* at 44-45. He stated that he did not always write everything down on appointed cases, just what he remembered at the time. He testified that the time sheets were always "way short of the time" he actually spent working on the cases. Counsel did not request any school, employment, or

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[10] Mr. Stein replaced Wayne Emmons after he withdrew in December 1985.

military records of the victim because he believed they were irrelevant to the case.

Marty stated that he interviewed Dr. Max West, a psychiatrist who examined Ms. Owens once in 1978 after she was charged with embezzlement. *Id.* at 55-58. Dr. West testified during the sentencing phase in mitigation of the offense. *Id.* at 97. Marty indicated that the defense attorneys petitioned the trial court for funds for private mental health evaluations, but the trial court denied the request. *Id.* at 59-67. The court, however, did authorize Midtown Mental Health Center ("MMHC"), a state funded facility, to evaluate Owens. *Id.* at 63-64. MMHC attempted to perform a mental evaluation of Owens on three separate occasions, however, she refused to speak with them about anything other than her family history until she spoke with counsel. *Id.* at 71-75. Marty further testified that he and Stein did not advise his client not to talk to MMHC "because [they] needed the mental evaluation. . . ." *Id.*

Marty stated that at trial the defense theory was that Owens had withdrawn the solicitations to kill her husband and that Porterfield murdered the victim in a burglary attempt. *Id.* at 107. Counsel indicated that he believed Owens' testimony was critical to her defense, however, despite the attorneys' efforts on several occasions to persuade her to testify, the Petitioner refused. *Id.* at 102-04. He opined that her testimony was crucial to support her innocence and to establish her mental state for mitigation. *Id.* at 102-09.

At the trial, Marty proposed that no sane white lady would venture into an unfamiliar, all black neighborhood and openly solicit men on the street to kill her husband. *Id.* at 108.

At the post-conviction hearing, Brett Stein testified that he had practiced law since 1963, primarily handling criminal cases. *Id.* at 126. He was appointed to Owens' case approximately thirty days before her trial commenced. *Id.* at 127. Stein indicated that Marty served as lead counsel and made the strategy decisions. *Id.* at 130. The case was his first bifurcated capital trial. *Id.* at 156. Like Marty, Stein also was unable to remember much of his participation in the case given the time lapse from the trial to the post-conviction hearing. *Id.* at 126-74. He testified that he did not obtain Owens' medical, educational, or employment history. *Id.* at 140.

Wayne Emmons testified that he represented Ms. Owens from May 1985 until he withdrew in December 1985 because of commitments in other cases. *Id.* at 184. He testified that before withdrawing from the case he filed a motion seeking the private services of mental health experts. *Id.* at 192. He indicated that he likely did not specify the reasons for the motion or any specifics such as cost of the expert because the motion was not filed ex parte. *Id.* at 195-97.

At the post-conviction hearing, Petitioner elicited the testimony of Eric Gentry, a traumatologist. *See* Addendum 13 at 217-01, 350-37. She offered Gentry's testimony, which related primarily to the social

history he compiled of Petitioner and his clinical determinations derived therefrom (referred to as a psychosocial assessment), to establish what additional mitigation evidence the defense counsel could have presented during the penalty phase of the trial.[11]

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[11] The criminal court of appeals noted that the post-conviction court made the following observations in its written finding of facts concerning Gentry, *see Owens*, 13 S.W.3d at 752:

> Although [Gentry] was unlicensed in any discipline, he held a Masters in Counseling, and at one time had been licensed in West Virginia in Social Work. He had many "certifications," many of which were irrelevant to the psychological assessment of the petitioner, such as Art Therapy, Biofeedback, Eye Movement Desensitization, etc., and many of which were the result of weekend training seminars. He was tendered to the Court as an expert in Traumatology, which he explained as a study of traumatic experiences, the effects of traumatic experiences, and what effects they have on a person who's experienced them both from a point of view of a clinical point of view and from a disaster point of view. . . .
>
> He had not published, but had an article accepted for publication on "compassion fatigue," a study of emergency workers and their problems. He also had another work accepted as a chapter in a book on how to work with trauma survivors, which had not yet been published. His practical experience consisted of working one year in an adolescent shelter, 1 [and] ½ years as a counselor for a community agency, one year as a sex abuse counselor, one year working with homeless children, one year as an addiction counselor at a "wilderness school," and four years working for a psychiatrist as a therapist, gradually concentrating on survivors of trauma. He had no training or experience in forensic psychology. At the time of his testimony, he was a student at Florida State University studying

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Among the testimony solicited from Gentry was his findings concerning statements made to him or investigators by Petitioner and several of her family members, friends, and acquaintances. Gentry testified that Owens grew up in a poor, filthy household. *Id.* at 300. He stated that Owens spent a considerable amount of time during her childhood with her aunt and uncle, Annie and Vardeman Nichols, whose home she allegedly preferred to her own. *Id.* at 300-01. Gentry related that Owens told him that her father would sometimes binge drink and beat his wife and children and that her mother also beat her. *Id.* at 300-02, 307-10. Gentry also testified that Owens indicated that she was sexually abused by her uncle, Marshall Kirksey, as a child. *Id.* at 305.

With respect to her relationship with her husband, Owens told Gentry that she was frequently

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marriage and family therapy and psychotraumatology. He claimed no expertise in anything other than his special area, and testified that "I consider myself an expert in working with survivors of trauma. That's the only thing – claiming any expertise in here as I sit in this chair right now." He stated he had never before testified as an expert, and would never testify as one again, after this hearing, because it was too hard. . . . When the witness was tendered as an expert in the field of Traumatology, this Court had serious reservations about his expertise, and asked the witness what he had been doing immediately before beginning his present studies at Florida State. Mr. Gentry answered that he had spent those last seven months prior to his current studies hiking the Appalachian Trail.

sodomized by her husband and was forced to have sex the night before the birth of her second child, resulting in a partial-abruptio placenta and emergency cesarian section. *Id.* at 355-56. Owens also told Gentry that when she became pregnant with their first child, Mr. Owens was angry with her because she did not take her birth control pills and he did not think they could afford to have a child. *Id.* at 368. Owens was charged twice with embezzlement, once after the birth of her oldest child and again after the birth of her second child. *Id.* at 369-70. Gentry opined that Owens likely embezzled to alleviate the financial strain on the marriage. *Id.* He also concluded that Owens has "very poor problem-solving and conflict resolution skills" and "often will acquiesce to the needs and demands of others in order to avoid social conflict." Addendum 13, Exhibit R at 21.

Dr. West also testified at the post-conviction hearing. He indicated that he examined Owens for an hour in 1978 after she was charged with embezzlement. *See* Addendum 13 at 327. He determined that the Petitioner did not exhibit symptoms of a psychotic process, and there was no history of psychotic disorders in her family. *Id.* at 323. Dr. West opined that Owens suffered from a personality disorder and some depression resulting from her developmental experiences at home. *Id.* He also testified that Owens told him that she probably needed help, she had a hard time being truthful with her husband and other people, and she began stealing as a child. *Id.* at 326. She indicated that she and her husband had problems

with sex early in her marriage, but it got better after the birth of their first child. *Id.* After being contacted by Stein in correspondence dated December 26, 1985, Dr. West responded via a letter in which he stated that at the time he evaluated Owens "it [was] extremely difficult, if not impossible to make a prediction in regards to possible future changes in the psychopathology which Ms. Owens has demonstrated." Addendum 13, Exhibit H at 12. Dr. West based his opinion on his "perception of [Owens] experiencing minimal if any guilt and remorse about her behavior, as she described events in her life during that [1978] session." *Id.*

Dr. West also testified at the post-conviction hearing that Eric Gentry's impressions as expressed in his psychosocial assessment were consistent with and were a logical extension of his own conclusions about Owens from their one hour interview in 1978. *See* Addendum 13 at 318-48. Dr. West stated that "many factors would suggest [that Owens] was ideally situated to be sexually abused," but he indicated that, during their interview, she stated that "everything was fine with her husband." *Id.* at 332-33. Moreover, Owens told Dr. West that the sexual adjustment in her marriage was satisfactory and that she had no problems with her pregnancies. *Id.*

At the close of Petitioner's offer, the State called Carolyn Hensley, Owens' sister. *Id.* at 438-78. She had testified for the State at Owens' trial. *Id.* at 439. Hensley retained custody of Owens' sons after her arrest. *Id.* At the hearing, she testified that Owens

had told her trial attorneys not to contact any of her family for trial purposes. *Id.* at 440. Hensley also indicated that had Owens called her to testify at the trial for mitigation purposes, she would not have done so. *Id.* at 442. Hensley opined that "I think I would have hurt her if they'd have asked me much more . . . in my mind I felt like that [sic] it was a matter of taking a life. And I pretty much felt that whatever the jury decided and the judge that that was how it was going to be." *Id.* at 442, 446. According to Hensley, her parents were very distraught over the murder and would not have testified on Owens' behalf either. *Id.* at 445. Hensley stated that no one in her family wanted to testify in favor of Owens, saying "no one wanted to change the sentence if that's what you're asking me." *Id.*

Hensley related that Gentry interviewed her before the post-conviction proceeding, and she had reviewed his report. *Id.* at 447. She testified that she did not agree with some of the facts found in Gentry's report. *Id.* at 450-66. For example, she noted that Owens never had meningitis and was never sexually abused by her uncle. *Id.* at 458-59. Hensley admitted, however, that her father was physically abusive to his children. *Id.* at 455.

Hensley also indicated that she frequently had social contact with the deceased and her sister. *Id.* at 463. She stated that she never witnessed Mr. Owens abuse Petitioner nor did she notice anything unusual about his behavior. *Id.* Hensley testified that she talked with her sister daily. *Id.* at 464. Despite the

fact that Owens confided in Hensley about her personal matters, the Petitioner never mentioned anything to Hensley about physical or sexual abuse. *Id.* Hensley recalled that Owens "spent money like crazy," and that her parents mortgaged their home in order to reimburse some of the money Owens embezzled from her employers. *Id.* at 466. Hensley testified that Owens was a chronic liar, and she lied about matters that were not "even really serious." *Id.* at 468.

2. Analysis Of Ineffective Assistance Of Counsel Claims

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In *Strickland v. Washington,* 466 U.S. 668, 684 (1984), the Court stated that "the Sixth Amendment right to counsel exists," and is necessary "to protect the fundamental right to a fair trial." A fair trial "is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland,* 466 U.S. at 685. The adversarial system as embodied in the Sixth Amendment includes the right to counsel because such skill is needed to provide a defendant the "'ample opportunity to meet the case of the prosecution.'" *Id.* (quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 275 (1942)). Accordingly, "'the right to counsel is

the right to the effective assistance of counsel.'" *Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970)). In defining what constitutes the constitutional requirement of effective assistance, the *Strickland* court noted that

> [i]n giving meaning to the requirement, however, we must take its purpose to ensure a fair trial – as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id. at 686. Furthermore, this principle applies equally to capital sentencing proceedings. *Id.* at 686-87.

The *Strickland* court established a two-part test for evaluating ineffective assistance of counsel claims. First, the defendant must demonstrate that counsel's performance was deficient such that counsel's errors were so serious that he was not functioning as constitutionally guaranteed. *Id.* at 687. Second, the defendant must show that counsel's inadequate assistance prejudiced the defense. *Id.* To establish prejudice, the defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

Whether attorney performance was sufficient to provide a defendant with a fair trial is based on whether the assistance was reasonably effective. *Id.* Therefore, to establish cause, the defendant must

demonstrate that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. Reasonableness is determined by considering all the circumstances. *Id.* "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

"To show prejudice, a defendant must demonstrate to a reasonable probability that, but for counsel's errors, the result would have been different." *Smith v. Mitchell,* 348 F.3d 177, 199 (6th Cir. 2003) (citing *Strickland,* 466 U.S. at 694). With respect to a challenge to a sentence of death, the prejudice determination is "whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695. Courts evaluating an ineffective assistance claim need not address both prongs if the defendant fails to establish one. *Id.* at 697.

a. Failure To Investigate Mitigating Evidence

Petitioner contends that counsel provided ineffective assistance by failing to investigate potential mitigation evidence. As an initial matter, Respondent asserts that this Court may not consider many of Petitioner's factual allegations when deciding this

claim because those contentions were not presented to the state courts.[12]

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[12] Respondent contends that Petitioner may not rely on the following factual allegations in support of her claim of ineffective assistance of counsel: 1) counsel failed to interview Owens' parents, Jewell Wilson Kirksey, Carolyn Hensley, Esther Kirksey, Marshall Kirksey, Mary Nichols, Thelma Nichols, Rev. Jimmy Greer, and her former teachers, including Ruth Levenson (Claim 1, ¶¶ 35(a)-(b)(i)-(viii)); 2) counsel failed to interview Gala Scott, Dianne Wood, Buddy Bradley, Carolyn Nobles, Dr. Joey Hensley, Ruth Levenson, Lucy Walker Shaw, Elizabeth Parnell (Claim 1, ¶ 37(a)(i)-(viii)); 3) counsel failed to interview George Sykes, Larry Gant, George James, Michael Powell, and John Jordon (Claim 1, ¶ 38 (a)-(e)); 4) had counsel interviewed the aforementioned people, counsel would have discovered that a) Owens' father was Jewell Kirksey, b) her mother was Izora Kirksey, c) Owens has a brother and a sister, d) her brother was born with cerebral palsy and is mentally retarded, e) her father worked long hours, f) her mother ran a baby-sitting business out of the family home, resulting in a disheveled home, g) neither of Owens' parents took care of her and her brother and sister, h) because her parents neglected their children, Owens had to provide care to her brother, i) her father was a mean spirited alcoholic, j) her father beat her mother and the children, k) the beatings often left bruises and welts on Owens' body, l) Owens' mother beat her on occasion, m) her parents physically and verbally fought, n) Owens' mother, in an attempt to avoid being beaten, required Owens to wait up with her at night until her father returned home from drinking, o) Owens' father threatened her mother with a butcher knife, p) Owens and her siblings often cried when their parents fought, q) her mother took money from her father and told him that Owens had taken the money, r) Owens was sent to live with the Vardaman Nichols family when her sister was born, s) Owens would stay periods of time with the Nichols family over the years and would cry when it was time to go home, t) Owens' uncle sexually abused her throughout her childhood, and Owens' mother refused to believe

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As previously noted, when a petitioner raises different factual issues under the same legal theory, she is required to present each factual claim to the highest state court in order to exhaust her state remedies. *O'Sullivan,* 526 U.S. at 845; *see also Pillette,* 824 F.2d

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it, u) Owens' father made her strip naked and lie across a bed while he lashed her with a belt, v) upon graduating from high school, Owens left home and moved into an apartment in order to get away from her father and mother, w) shortly after moving out, Owens met Mr. Owens, x) on their honeymoon, Mr. Owens caused Ms. Owens to bleed, accused her of being frigid, and left the motel room threatening to "find someone else," y) Mr. Owens often demanded that his wife perform fellatio, which caused her to occasionally vomit, z) Mr. Owens forced Owens to submit to anal intercourse, aa) after the cesarian birth of their youngest son Mr. Owens went on a date with a woman with whom he was having an affair, bb) Mr. Owens engaged in sexually inappropriate conduct in public, cc) during their marriage, Owens' body weight fluctuated, dd) Mr. Owens humiliated his wife by publicly making comments related to Ms. Owens' weight gain, ee) Mr. Owens physically assaulted the Petitioner, threatened to kill her, and threatened to leave her and take their children, ff) Mr. Owens used cocaine and amphetamines, gg) Owens sought psychiatric help from Dr. Max West, but stopped when Mr. Owens refused to attend counseling sessions, hh) prior to Mr. Owens' death, Mr. And Ms. Owens slept in separate beds, ii) Owens intended to commit suicide after finding her husband in a parking lot with another woman, jj) on her way to commit suicide, she decided instead to hire someone to kill Mr. Owens; she stopped and asked some African-American men if they would be interested in doing so, kk) for a month and a half Owens gave these men money to obtain items to be used to kill Mr. Owens and to keep them quiet, 11) Owens did not want her husband to suffer, and mm) she did not know the manner in which her husband would be murdered (Claim 1, ¶¶ 39 (a)-(w), (y)-(z), (aa), (ff)-(gg), (ii), (kk)-(oo), (ss)-(ww)).

at 496. A petitioner has not exhausted her state remedies if she has merely presented a particular legal theory to the courts without presenting each factual claim. *Pillette,* 824 F.2d at 497-98. To determine whether Petitioner's allegations may be considered, the Court must determine therefore whether she presented them to the state courts.

In the state court proceedings, Owens raised the issue of ineffective assistance of counsel as evidenced by counsels' failure to investigate mitigating evidence. *See* Addendum 14 at 16-24; Addendum 18 at 9-17. At the post-conviction hearing related to her claim of ineffective assistance of counsel, Petitioner presented the testimony of Eric Gentry, a traumatologist. *See* Addendum 13 at 217-01, 350-37. Gentry's testimony was offered to show what additional mitigation evidence the defense counsel could have presented during the penalty phase of the trial. Among the testimony solicited from Gentry was his findings concerning statements made to him or investigators by Petitioner and several of her family members, friends, and acquaintances. Gentry relied primarily on his psychosocial assessment of Petitioner when testifying at the post-conviction hearing. Many of the people that Gentry referenced in his assessment were persons who Petitioner alleges in this Court that trial counsel should have interviewed for mitigating evidence. These persons include Izora Kirksey, Wilson Kirksey, Carolyn Hensley, Steven Owens, Brian Owens, Thelma Nichols, Reverend James Greer, and Esther Kirksey. Furthermore, Gentry's psychosocial

assessment and testimony at the hearing concerned what trial counsel allegedly would have uncovered about Owens' background had they interviewed these individuals. Many of Gentry's findings concerning Owens' background are the same allegations that she offers in this Court in support of her claim of ineffective assistance of counsel based on failure to investigate. These findings and testimony include the allegations put forth in Claim 1, ¶ 35(a)-(b)(i)-(iii); (b)(vi)-(viii) and ¶ 39(a)-(w), (y)-(z), (aa), (ff)-(gg), (ii), (kk)-(oo), (ss)-(ww).

The Court recognizes that merely raising or referencing an issue in the trial court is insufficient to exhaust state remedies. The Tennessee Court of Criminal Appeals, however, the final state court to rule on the merits of Petitioner's post-conviction motion, clearly considered Gentry's assessment and testimony when deciding Petitioner's claim of ineffective assistance of counsel based on counsel's failure to investigate. *See Owens,* 13 S.W.3d at 750-55. Moreover, Owens' briefs to the court of criminal appeals and the Tennessee Supreme Court reference Gentry's assessment and trial testimony along with the post-conviction judge's findings concerning Gentry's assessment and testimony. Accordingly, this Court may consider the allegations found in Claim 1, ¶ 35(a)-(b)((i)-(viii)) and ¶ 39 (a)-(w), (y)-(z), (aa), (ff)-(gg), (ii), (kk)-(oo), (ss)-(ww), when evaluating Petitioner's claim of ineffective assistance of counsel based on counsel's alleged failure to investigate mitigating evidence. These allegations will be viewed by the Court,

however, only to the extent and form in which they were presented to the state courts. The Court further finds that Petitioner's assertions in Claim 1, ¶¶ 37(a)(i)-(a)(viii) and 38 (a)-(e), that trial counsel failed to interview specific persons with knowledge of Mr. Owens' extramarital relationships and with knowledge of Petitioner's actions and activities in late 1984 to February 1985, were not presented to the state courts. Accordingly, the Court concludes that these claims were not exhausted in the state courts, and are therefore now procedurally defaulted such that this Court may not consider them. *O'Sullivan,* 526 U.S. at 845.

The mitigation evidence offered at the sentencing hearing consisted of the testimony of Dr. West that Petitioner had been treated by a psychiatrist on one occasion in 1978 for severe behavioral problems and testimony from two jail employees that Petitioner was a good prisoner who caused no problems, volunteered to work, and attended Bible study classes.

In support of her failure to investigate claim, Owens relies in part on trial counsel's time sheets which were submitted to the trial court for compensation. Petitioner maintains that counsel's entry of only two hours for investigation is insufficient. At the post-conviction hearing, trial counsel had difficulty remembering their involvement in the case which occurred almost ten years prior to the hearing. Moreover, Stein's case file was destroyed in an office fire. Marty also testified that the time recorded on his time sheets was "way short" of the actual time he

spent working on the case. The Court must examine the entire record of the trial proceedings to determine whether the appellant received effective assistance of counsel. *See e.g., Hopkinson v. Shillinger,* 866 F.2d 1185, 1217 (10th Cir. 1989), *overruled on other grounds by Sawyer v. Smith,* 497 U.S. 227 (1990) (holding that defendant must show specific errors, not solely based upon amount of time afforded to attorney to prepare defense) (citing *United States v. Cronic,* 466 U.S. 648, 654 (1984) and *United States v. Pearson,* 798 F.2d 385, 388 (10th Cir. 1986)). The court of criminal appeals determined, and this Court agrees that the length of time counsel spent on the case is not dispositive of this issue. *See Owens v. State,* 13 S.W.3d at 755.

Petitioner further asserts that her ineffective assistance claim is evidenced by counsel's failure to investigate her background, including her personal, medical, and mental history. The court of criminal appeals determined that Petitioner specifically alleged that counsel failed to obtain (1) her school records; (2) the birth records of her children; (3) the file of Dr. Max West; and (4) her records from Midtown Mental Health. *See id.* She contends that these records would have provided the jury with the "psychodynamics of [her] background and why certain building blocks of her personality never developed." Petitioner maintains that these records would show that she suffered from a "dependent personality disorder" and an abusive childhood and marriage.

Counsel has an obligation to investigate and present mitigating evidence at the penalty phase of a capital trial. *See Wiggins v. Smith,* 539 U.S. 510 (2003) (holding that scope of investigation into client's "misery as a youth" fell short of the professional standards then prevailing because counsel knew of "unfortunate childhood" and there was nothing to suggest that further investigation would have been either counterproductive or fruitless); *Williams v. Taylor*, 529 U.S. at 398-99 (holding that failure to investigate petitioner's background, which was horrific, resulted in ineffective assistance as defined by *Strickland*); *Coleman v. Mitchell,* 268 F.3d 417, 449 (6th Cir. 2001) (determining that counsel provided ineffective assistance of counsel by failing to discover and present the jury with defendant's personal history including evidence that defendant's grandmother physically and mentally abused him, neglected him while running a brothel and gambling house in her home, and involved defendant in voodoo practice by making him kill animals); *Skaggs v. Parker,* 235 F.3d 261, 269 (6th Cir. 2000) (finding ineffective assistance of counsel based on counsel's failure "to present the jury with a realistic view of [defendant's] mental status" because of counsel's inadequate preparation for the penalty phase of the trial); *Austin v. Bell,* 126 F.3d 843, 848 (6th Cir. 1997) (concluding that counsel provided ineffective assistance by failing to investigate and present mitigating evidence at the penalty phase of the trial, despite the fact that counsel "did not think it would do any good" to do so); *Glenn v. Tate,* 71 F.3d

1204, 1207 (6th Cir. 1995) (finding ineffective assistance of counsel because "the jury was given virtually no information on [defendant's] history, character, background and organic brain-damage – at least no information of a sort calculated to raise reasonable doubt as to whether [defendant] ought to be put to death. . . . The information was not presented to the jury because counsel never took the time to develop it."). The Supreme Court has determined that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Strickland,* 466 U.S. at 688-89. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins,* 539 U.S. at 524 (citations omitted) (emphasis in original). "Among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* (citation omitted).

The post-conviction court, and court of criminal appeals, determined that Petitioner's trial counsel did not provide ineffective assistance of counsel by failing to investigate Petitioner's background. In so concluding, the post-conviction court considered the evidence offered at the hearing and found that

In addition to Mr. Gentry's lack of training and experience, this Court finds many of his sources of information appear highly suspect or biased. His primary source for petitioner's social history was petitioner herself, who admittedly has a serious problem with truthfulness. Much of the history she reported was contradicted by her family members, and all of the "sexual trauma" she reported was totally unsupported by any other witnesses or medical records. . . . All of the "trauma" experienced by petitioner, on which Mr. Gentry based his opinions, such as sexual brutality performed on the victim by her husband, was totally unverified. As an example, petitioner claimed that her husband once raped her with a wine bottle, breaking the neck of the bottle off in her vagina. According to petitioner, she did not seek medical treatment, however. There is no proof in the record that she ever related any of this alleged sex abuse or violence to anyone during her entire marriage, or for the first five months of her attorneys' representation. She apparently first related this information to her attorneys the week of the hearing on her pretrial motions. When asked if her children were ever exposed to any of this, Mr. Gentry responded that petitioner told him "that Gaile and Ron were very careful to not let the kids see any of the fights between them that they had" so they would send the kids out to play first. Her family members and friends denied that anything seemed wrong.

. . .

Not only was most of the history petitioner related to Mr. Gentry unverified by independent sources, but much of it was contradicted by her family and other prior statements of petitioner herself. As examples of this, petitioner related to Mr. Gentry that her uncle sexually abused her, and that she had talked to her mother about it. Her mother denied it. Petitioner apparently never told anyone about this molestation until preparing for the hearing on this petition. She said she wanted to have children and the victim did not, and was angry with her for getting pregnant, so she committed the embezzlements to eliminate the financial strain of her pregnancies. This flies in the face of all the evidence that pointed to his loving his two sons, and her reporting to Dr. West that she stole because she wanted extra things for herself and her family. She also stated to Mr. Gentry that in December 1985 [sic], she caught her husband and Gala Scott coming back together to his office early one morning, and when he got angry at her for spying he slammed her into his car and called her a "bitch." She stated she decided at that time, while driving out of the parking lot, to commit suicide, and headed to the Mississippi bridge, but instead, apparently on impulse, asked a group of men she saw if they would kill her husband. She claims to have done this for only three days, and then stopped and began trying to recover the photographs and diagrams she had given the

men. This unsupported allegation flies in the face of trial testimony that she repeatedly solicited her husband's death over a period of weeks and months. She also explained to Mr. Gentry that she was physically abused, but explained that she had told the police and Dr. West that she had never been physically abused because she didn't think things like being beaten with a belt was physical abuse. However, in her confession to the police she stated she had her husband killed because "We've just had a bad marriage over the years, and I just felt like he had . . . mentally I just felt like he had been cruel to me. There was very little physical violence."

. . .

No other witnesses support any of her alleged medical problems, or their causes, which are also unsupported by any documentation. Petitioner has failed to show her attorneys ineffective in failing to investigate her medical history, as there is nothing her attorneys could have discovered other than the unsupported statements of petitioner, who has been described as a chronic liar by her psychiatrist, her "traumatologist," and her sister.

. . .

In summary, the best person to have testified to all this abuse during trial would have been petitioner, if this story of continued sexual abuse and physical abuse were true. If her trial attorneys had called Mr. Gentry

> as a witness, or someone else in 1986 with the same lack of qualifications, his testimony would have been given little or no weight by the jury. Since his testimony as to petitioner's social history of trauma was based almost exclusively on what petitioner had told him, he could have been cross-examined about his knowledge of all of petitioner's embezzlements and forgeries, and the lack of verification for the "trauma" petitioner related to him would have been obviously apparent. He would not have been able to explain the lack of any indication of trauma in her history, testing and evaluation by Dr. West, which was taken after the abuse is alleged to have started, but prior to her husband's murder. The state could have called petitioner's family members in rebuttal to deny the social history related by petitioner. Finally, testimony of petitioner's suffering from "dependent personality disorder" would have negated a mitigating reason for her to have caused her husband's death.

Owens, 13 S.W.3d at 752-53.

Thus, in sum, the post-conviction court determined that counsel's purported failure to investigate Petitioner's background did not result in deficient performance because, had counsel investigated Petitioner's background, counsel would not have discovered any medical evidence of sexual or physical abuse by Mr. Owens; no one would have verified Mrs. Owens' allegations of sexual, physical or mental

abuse; many of Mrs. Owens' allegations concerning her childhood would have been contradicted by her family; and Mrs. Owens' family did not wish to testify at the sentencing phase, and if called, would have given damaging testimony.

This Court notes that, at the post-conviction hearing, Petitioner could have called those persons that she asserts in her habeas petition would have supported her allegations concerning her childhood/adolescence and marital relationship. She did not, however, call these persons to testify. Thus, with respect to Petitioner's background, the only evidence presented to the post-conviction court was Dr. West's and Gentry's testimony, which was based on statements made by Petitioner, statements made by others to Gentry, and statements made to investigators.

Dr. West had evaluated Petitioner one time in 1978, and his testimony consisted primarily of his conclusion that Gentry's assessment of Petitioner was consistent with his limited evaluation of her. Although Gentry's testimony would have been admissible at the sentencing proceedings despite the fact that it was replete with hearsay and double hearsay, the post-conviction court was in a position to hear and evaluate Gentry's testimony and determine the credibility and effect that such evidence would have had if presented to the jury. The post-conviction court determined

> that even assuming the performance of her trial attorneys was deficient, that deficiency

> caused no prejudice to petitioner. First, the nature and extent of the mitigating evidence that has been suggested should have been offered has little credibility or relevance. Second, although similar mitigating evidence was not presented, if it had been presented it would have opened the door to damaging evidence to the contrary. Finally, there was such strong evidence of petitioner's planning and participation [on] the day of the murder, such persistent, focused and long term offer of "remuneration for murder," and efforts at continued concealment after the murder, that the evidence would not have affected the jury's determination, and would have allowed the prosecution to put on in rebuttal otherwise irrelevant evidence of continued lies, manipulation and theft by petitioner, eradicating any good will or sympathy the jury might have had for petitioner due to the testimony of Dr. West and the two jail employees.

Id. at 755.

The post-conviction court concluded that Petitioner failed to show any deficient performance by her attorneys in preparing for the sentencing phase and that even if counsel was deficient, Petitioner did not suffer any prejudice. *Id.* The court of criminal appeals determined that the evidence did not preponderate against the post-conviction court's findings, and as a result, determined that Petitioner's claim was without merit. *Id.*

In assessing prejudice, a federal court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins,* 539 U.S. at 534. This Court's review is circumscribed, however, by the post-conviction court's conclusion with respect to prejudice, given that the post-conviction court reached the prejudice prong of the *Strickland* analysis. *See id.* This Court may grant relief only if the state court's factual determination was "objectively unreasonable" in light of the evidence presented in the state court proceedings. Moreover, the state court's factual determinations are entitled to a presumption of correctness, which is rebuttable only by clear and convincing evidence.

The Court finds that the post-conviction court's determinations that the mitigation evidence offered at the post-conviction hearing was not credible and, had it been presented to the jury, it would have opened the door to damaging evidence to the contrary, such that Petitioner was not prejudiced, are not "objectively unreasonable" in light of the evidence presented at the hearing. Moreover, Petitioner has not established by clear and convincing evidence that the post-conviction court's factual determinations are incorrect. Accordingly, this Court concludes that the post-conviction court's ruling did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the post-conviction hearing and that the state court's determination was neither contrary to, nor an

unreasonable application, of clearly established federal law.

Petitioner also maintains that trial counsel provided ineffective assistance by failing to investigate Mr. Owens' records and background and extramarital affairs because they supported her position that she was physically, sexually, and mentally abused by him. She contends that records, such as his military and employment records, demonstrate that Mr. Owens lied about such things as serving in the Vietnam War and his educational and employment history. Furthermore, she asserts that Mr. Owens had extramarital affairs and was engaged in one at the time she solicited his murder. Petitioner maintains that had trial counsel uncovered and presented such evidence to the jury, her claims of abuse by Mr. Owens would have been bolstered because the jury would have been provided with a picture of Mr. Owens other than that of an honest, hard-working family man. Petitioner asserts that the jury would have been more receptive to her claims of abuse had this proof been presented.

The post-conviction court determined that the victim's character traits were irrelevant for mitigation in a capital sentencing hearing. *Owens,* 13 S.W.3d at 755; *State v. Johnson,* 698 S.W.2d 631, 634 (Tenn. 1985); *see also State v Teague,* 680 S.W.2d 785, 788 (1984) (victim's traits are irrelevant to mitigation evidence). The post-conviction court also observed that Petitioner's "claims of abuse were just that, claims, without any other corroborating evidence to

support them," and as such, trial counsel had no reason to try to bolster these abuse contentions. *Id.* The court of criminal appeals determined that the evidence did not preponderate against the trial court's findings. *Id.*

The Supreme Court has held that a capital defendant is constitutionally guaranteed to present "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604-05 (1978). Courts may, however, "exclude, as irrelevant, evidence not bearing" on those factors. *Id.* at 605. In Tennessee, "evidence is relevant to the punishment only if it is relevant to a statutory aggravating circumstance or to a mitigating factor raised by the defendant." *Porterfield,* 746 S.W.2d at 449 (citing *Cozzolino v. State,* 584 S.W.2d 765, 768 (Tenn. 1979)).

The court of criminal appeals determined that the post-conviction court's conclusion that evidence concerning Mr. Owens' background was irrelevant to the mitigation of Petitioner's case because Petitioner failed to corroborate her claims of abuse suffered at the hands of Mr. Owens was appropriate. *Owens,* 13 S.W.3d at 755. As such, the court of criminal appeals opined that trial counsel's performance in allegedly failing to investigate the deceased's background was not ineffective. *Id.*

Petitioner has failed to produce clear and convincing evidence that the state courts' determination that she failed to corroborate her claims of abuse is incorrect. The Court does not find the state courts' conclusion that Petitioner failed to establish that she suffered prejudice from trial counsel's alleged failure to investigate Mr. Owens' background objectively unreasonable. Furthermore, the Court determines that the post-conviction court's conclusion that trial counsel's alleged failure to investigate and present as mitigation evidence Mr. Owens' medical, educational, and employment records and proof of extramarital affairs, did not result in ineffective assistance of counsel, was neither contrary to, nor an unreasonable application, of clearly established federal law. Accordingly, the Court grants Respondent's motion for summary judgment as to Petitioner's claim of ineffective assistance of counsel based on failure to investigate mitigating evidence, Claim 1, ¶¶ 33-39.

b. Failure To Obtain Expert Services

Petitioner asserts that trial counsel provided ineffective assistance of counsel by failing to comply with procedural requirements when requesting funds prior to trial to employ a mental health expert. She maintains that trial counsel failed to identify 1) the name of the proposed expert, 2) the type of expert, 3) how and when the expert services would be performed, 4) the cost of the services, and 5) a statement of need for the services. Owens further asserts that

trial counsel should have made the request in an *ex parte* motion. If trial counsel had complied with the procedural requirements and obtained the expert's services, that witness would have determined among other things that Owens had a troubled childhood, suffered from characterlogical problems, and at the time of the offense was suffering from a "moderately severe affective mental disorder."

The Tennessee Court of Criminal Appeals considered whether trial counsel rendered ineffective assistance in failing to file an *ex parte* motion for funds for a mental health expert. In so doing, the court noted that prior to trial, counsel filed a motion requesting funds for an independent mental health evaluation of Ms. Owens. *Owens*, 13 S.W.3d at 755. The court further observed that the trial court denied the motion, but ordered an examination be performed by Midtown Mental Health Center to determine her competency and sanity. *Id.* The appellate court then determined that Owens failed to establish that she was prejudiced by counsel's failure to request in an *ex parte* motion the services of an independent expert. *Id.* at 756. In order to receive funding for an independent expert, the appellate court stated that "[t]he defendant must show that a substantial need exists requiring the assistance of state paid supporting services and that this defense cannot be fully developed without such professional assistance." *Id.* (quoting *State v. Evans*, 838 S.W.2d 185, 192 (Tenn. 1992)). Notwithstanding the testimony of Eric Gentry, the

court concluded that the proof did not establish that a "substantial need" existed for such services. *Id.*

In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Ake*, 470 U.S. at 74. The *Ake* court further held that the State must provide similar expert assistance "in the context of a capital sentencing proceeding, when the state presents psychiatric evidence of the defendant's future dangerousness." *Id.* at 83. The *Ake* majority emphasized, however, that its ruling was limited to cases in which the defendant's mental condition was "seriously in question" upon a "threshold showing" by the defendant. *Id.* at 82. Furthermore, the court determined that the state was obligated to provide only one competent psychiatrist and that it could choose that psychiatrist. Thus, the defendant's right does not include the selection of a psychiatrist of his choice. *Id.* at 83 (noting that "[t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.").

The Sixth Circuit has interpreted *Ake* as requiring psychiatric assistance during the sentencing phase if 1) the defendant's sanity was a significant factor at trial, or 2) the state presents psychiatric evidence of future dangerousness at the sentencing

phase. *Smith*, 348 F.3d at 207; *Mason v. Mitchell*, 320 F.3d 604, 615-16 (6th Cir. 2003); *Thompson v. Bell*, 315 F.3d 566, 588-89 (6th Cir. 2003); *Skaggs*, 235 F.3d at 272; *United States v. Osoba*, 213 F.3d 913, 917 (6th Cir. 2000); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th Cir. 1990) (en banc opinion of Kennedy, J., with five Judges concurring and one Judge concurring in the result). Therefore, under current federal case law, a defendant who simply contests the mental element of the crime or the appropriateness of the death penalty due to diminished capacity is not entitled to the assistance of an expert.

Tennessee has determined that expert services must be provided upon a showing of substantial need. Thus, instead of the two limited circumstances in which expert services are required pursuant to *Ake*, a defendant in Tennessee may receive expert services upon a showing of substantial need.

In the instant case, Petitioner did not assert an insanity defense nor did the prosecution attempt to establish at the sentencing hearing that she posed a future danger or threat. Instead, Petitioner sought the assistance of a mental health expert in order to present mitigation evidence that her mental health lessened her culpability in her husband's murder. The State therefore was not required under federal law to provide Petitioner with an independent mental health expert. The state court's determination that Owens failed to establish that a substantial need existed which required expert services is not contrary to federal law. As such, Owens has not established

under *Strickland* that she was prejudiced by her trial counsel's failure to seek an independent mental health evaluation. The Court finds that the state court's ruling was neither contrary to nor an unreasonable application of federal law; nor was it an unreasonable determination of the facts in light of the evidence presented. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 1, ¶¶ 40-42.

c. Failure To Overcome State's Hearsay Objections At The Sentencing Hearing

Petitioner's final claim of ineffective assistance of counsel is based on counsel's failure to overcome the State's hearsay objection made to Dr. West's testimony during the sentencing phase. At that hearing, trial counsel attempted to question Dr. West about Owens' social history. The State objected on the basis of hearsay. The trial court sustained the objection, despite the fact that Tennessee Code Annotated § 39-2-203(c) (repealed) permitted the introduction of hearsay testimony during the sentencing phase in a capital case.

The Tennessee Court of Criminal Appeals affirmed the post-conviction court's finding that Owens had not established ineffective assistance of counsel. *Id.* The court based its determination on the lower court's finding that Petitioner failed to establish prejudice as a result of trial counsel's actions. *Id.* The

court concluded that Owens failed to establish prejudice because if Dr. West had been allowed to present hearsay testimony about Owens' social history, "he would have revealed, 'damaging admissions by petitioner that she had no problems with her marriage, and that she had a long term problem with lying and stealing, [which] would not have helped her gain sympathy with the jury.'" *Id.*

Thus, the state court made a factual determination that Dr. West's testimony would not have furthered Owens' case. With respect to that determination

> a federal habeas court may not grant habeas relief under § 2254(d)(2) simply because the court disagrees with a state trial court's factual determination. Such relief may only be granted if the state court's factual determination was "objectively unreasonable" in light of the evidence presented in the state court proceedings. Moreover . . . , the state court's factual determinations are entitled to a presumption of correctness, which is rebuttable only by clear and convincing evidence.

Young, 52 Fed. Appx. at 236 (citing 28 U.S.C. § 2254(e)(1)). This Court finds that although the state court's determination that Petitioner did not suffer prejudice from trial counsel's failure to overcome the hearsay objection may be unreasonable, it cannot be said that it is objectively unreasonable. Accordingly,

the Court grants Respondent's motion for summary judgment as to Claim 1 in its entirety.

C. Claim 2 – The State Violated The Sixth, Eighth, And Fourteenth Amendments By Withholding Exculpatory Evidence

Petitioner asserts that the prosecution failed to provide her with any information that Mr. Owens "had numerous girlfriends, extramarital sexual affairs possibl[y] involving unusual sexual proclivities and/or perversions. . . ." Addendum 1 at 149. Owens claims that she requested this information because "these proclivities, perversions, and affairs were flaunted and visited upon [Petitioner] with such regularity and in such ways as to contribute to her state of mind and mental conditions. . . ." *Id.* During the investigation of Mr. Owens' murder, investigators discovered notes and letters from Gala Scott to Mr. Owens in his office. The police report indicates that these letters evidence that Scott and the decedent had an affair. The prosecution did not provide Petitioner with the letters or notes nor did they inform her of their existence. Owens maintains that the prosecution's failure to disclose this evidence resulted in a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The court of criminal appeals determined that Petitioner's *Brady* claim was not meritorious because she was aware of her husband's extramarital affairs and the love letters and notes were not exculpatory.

Owen, 13 S.W.3d at 758. The court of criminal appeals stated that

> [t]he proof establishes that [Petitioner] discovered the victim's affair with Gala Scott several months prior to the murder. This discovery led [Petitioner] to consider suicide and subsequently solicit her husband's murder. Moreover, [Petitioner's] attorneys were aware of extramarital affairs of the victim through their conversations with the appellant as evidenced by their request for information in their exculpatory motion. The duty upon the State under *Brady* does not extend to information already in the possession of the defense or that they are able to obtain or to information not in possession or control of the prosecution. *Banks v. State*, 556 S.W.2d 88, 90 (Tenn. Crim. App. 1977).
>
> More importantly, however, is the requirement that the information suppressed must have been exculpatory, i.e., favorable to the appellant. We conclude that this evidence was not favorable and, accordingly, no *Brady* violation is found. In this regard, we would not disagree with trial counsel's testimony that introduction of this evidence may have provided the appellant with a motive to kill her husband. This issue is without merit.

Id. at 758-59.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request

violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The prosecution is required to disclose such evidence even if the accused has failed to request the evidence. *United States v. Agurs*, 427 U.S. 97, 107 (1976).The duty to disclose evidence includes impeachment evidence as well as exculpatory evidence. *United States v. Bagley,* 473 U.S. 667, 676 (1985). The duty to disclose also encompasses evidence "known only to police investigators and not to the prosecutor." *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). "[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*; *see also Kyles*, 514 U.S. at 433-34. "There are three components of a true *Brady* violation: [1] [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler*, 527 U.S. at 281-282.

With respect to the first component, the court of criminal appeals determined that the love letters were not exculpatory because they were not favorable

to Owens. In so concluding, the court determined that the letters may have provided her with a motive to kill Mr. Owens. As Petitioner points out, however, this conclusion assumes that the evidence of the love letters would have been presented during the guilt phase. If such were the case, then certainly the evidence would not have been favorable. Petitioner asserts, however, that had she known of the letters, she could have used them to corroborate her allegation of mental abuse as mitigation evidence. The Court finds that it is unnecessary to determine whether the love letters and police report were exculpatory evidence because Petitioner has failed to establish the third element of a *Brady* claim, i.e., prejudice resulting from the suppression of the evidence.

Brady requires the disclosure of evidence that is material either to guilt or to punishment. The record indicates that Petitioner knew of Mr. Owens' affair with Scott months before his murder. In fact, Owens asserted that she solicited her husband's murder after finding him in a parking lot with Scott. Moreover, as established by defense counsel's request for evidence of Mr. Owens' extramarital affairs, Petitioner had informed her attorney of Mr. Owens' liaisons. Despite knowing this, the defense presented no mitigation evidence at the sentencing phase of the decedent's illicit conduct.

Petitioner maintains that she did not present such evidence because she had nothing to corroborate her allegations. The Court finds this argument

unavailing because she could have corroborated her allegations with Scott's testimony. Had Petitioner wished to introduce evidence of the decedent's extra-marital affairs, she could have subpoenaed Scott to testify. Petitioner has not shown that there was a reasonable probability that her conviction or sentence would have been different had these materials been disclosed. She therefore cannot show materiality or prejudice under *Brady*. The Court finds therefore that the state court's conclusion that Petitioner's *Brady* claim is without merit is neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; nor is it an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 2, ¶¶ 56-66.

D. Claim 3 – Petitioner's Fifth, Sixth, Eighth, And Fourteenth Amendment Rights Were Violated By 1) The Trial Court's Denial Of Petitioner's Request For Funds To Hire An Independent Mental Health Expert; And 2) The Denial Of Access To Counsel During Petitioner's Court-Ordered Mental Health Examination

Petitioner asserts that her constitutional rights were violated by the trial court's denial of her request for funds to employ an independent mental health

expert. Before trial, Petitioner sought funds to hire a mental health expert to investigate her 1) competence to stand trial, 2) legal sanity at the time of the crime and mental state relating to her degree of culpability, and 3) matters related to mitigation in the event of conviction. At the hearing on Petitioner's request for funds, trial counsel informed the court of his belief that his client could assert a meritorious battered wife syndrome defense that would be relevant at both the guilt and sentencing stages. Addendum 2 at 148-65. In support of Ms. Owens' request for funds, trial counsel told the court about various allegations of sexual abuse that the Petitioner suffered at the hands of her husband. *Id.*

The trial court ordered Midtown Mental Health Center ("MMHC") to perform a competency and sanity exam. Addendum I at 67. The trial court further indicated that if either of these inquiries established that further testing was needed, it would reconsider Petitioner's request for funds. Addendum 2 at 148-65. When MMHC attempted to evaluate Petitioner to determine her sanity at the time of the offense, she refused to answer their questions in the absence of her attorney. *See* Addendum 1 at 77. MMHC therefore was unable to perform an evaluation of Petitioner's sanity at the time of the crime. *Id.* The trial court thereafter denied Owens' request for funds to hire an independent mental health expert.

On direct appeal, the Tennessee Supreme Court denied Petitioner relief on this issue without discussion. She now seeks habeas relief from the state court

ruling, basing her challenge to the trial court's ruling on *Ake*, 470 U.S. 68.

In *Ake*, the Supreme Court held that "when a defendant has made a preliminary showing that [her] sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Ake*, 470 U.S. at 74 (holding that, upon a proper showing by the defendant, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."). The *Ake* court further held that the State must provide similar expert assistance "in the context of a capital sentencing proceeding, when the state presents psychiatric evidence of the defendant's future dangerousness." *Id.* at 83. The *Ake* majority emphasized, however, that its ruling was limited to cases in which the defendant's mental condition was "seriously in question" upon a "threshold showing" by the defendant. *Id.* at 82. Furthermore, the Court determined that the state was obligated to provide only one competent psychiatrist based on its selection. Thus, the defendant's right does not include the right to a psychiatrist of her choice. *Id.* at 83 (noting that "[t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of [her] personal liking or to receive funds to hire [her] own.").

The Sixth Circuit has followed *Ake* by requiring psychiatric assistance during the sentencing phase only if 1) the defendant's sanity was a significant factor at trial, or 2) the state presents psychiatric evidence of future dangerousness at the sentencing phase. *Smith*, 348 F.3d at 207; *Mason*, 320 F.3d at 615-16; *Thompson*, 315 F.3d at 588-89; *Skaggs*, 235 F.3d at 272; *Osoba*, 213 F.3d at 917; *Kordenbrock*, 919 F.2d at 1120 (en banc opinion of Kennedy, J., with five Judges concurring and one Judge concurring in the result). Therefore, a defendant who simply contests the mental element of the crime or the appropriateness of the death penalty due to diminished capacity is not entitled to the assistance of an expert.

In the instant case, Owens did not assert an insanity defense nor did the prosecution attempt to establish at the sentencing hearing that she posed a future danger or threat. Instead, Petitioner sought the assistance of a mental health expert in order to present mitigating evidence that her mental health lessened her culpability in her husband's murder. The State therefore was not required to provide her with an independent mental health expert. As such, the Court finds that the state court's ruling was neither contrary to nor an unreasonable application of federal law; nor was it an unreasonable determination of the facts in light of the evidence presented. Accordingly, the Court denies Petitioner relief on her *Ake* claim and grants summary judgment of Claim 3, ¶¶ 67-70, 75.

Petitioner likewise asserts that her constitutional rights were violated because she was denied access to her attorneys during a court-ordered mental health examination. Claim 3, ¶¶ 71-74, 76. She refused to answer certain questions and as such the mental health expert was unable to evaluate her sanity at the time of the crime. Respondent argues that Petitioner procedurally defaulted this claim by failing to raise it in the state courts. Petitioner maintains, however, that these assertions merely supplement her claim that the trial court erred by failing to authorize funds for an independent mental evaluation. Owens asserts therefore that pursuant to *Vasquez v. Hillery*, 474 U.S. 254 (1986), this claim is not procedurally defaulted because it does not "fundamentally alter" the claim presented to the Tennessee courts.

In *Vasquez*, the state court considered the issue of whether blacks had been purposefully excluded from service on grand juries. *Vasquez*, 474 U.S. at 256-57. The state court concluded that no discrimination had occurred in the selection of grand juries. *Id.* During habeas review, the district court directed the parties to present supplemental evidence concerning such alleged discrimination. *Id.* The evidence consisted of affidavits and a computer analysis assessing the mathematical possibility that chance or accident could have accounted for the exclusion of blacks from grand juries. *Id.* The petitioner asserted that the inclusion and consideration of the new evidence by the district court circumvented the respondent's

obligation to exhaust state remedies. *Id.* at 257. In concluding that the petitioner did exhaust the state court remedies, the Court determined that "the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts" – i.e., whether respondent was denied equal protection of the law based on discrimination in grand jury selection. *Id.* at 260.

Unlike the evidence considered by the trial court in *Vasquez*, Petitioner's assertion that her constitutional rights were violated because she was denied access to her attorneys during a court-ordered mental health examination presents an entirely independent claim from that of whether the trial court erred in denying Petitioner's request for funds to employ an independent mental health expert. The evidence considered by the district court in *Vasquez* was material that the district court itself requested in order to more fully evaluate the claim which had already been considered by the state supreme court. In the instant action, the state courts were never given an opportunity to review the merits of Petitioner's claim that her constitutional rights were violated because she did not have counsel present during her psychological evaluation. Thus, the Court concludes that Petitioner's constitutional claim regarding the lack of access to her attorney during her mental evaluations fundamentally alters her legal claim that her Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by the trial court's denial of Petitioner's

request for funds to hire an independent mental health expert.

Petitioner failed to exhaust this claim in the state court proceedings and, thus, she is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting this claim. Accordingly, Owens has procedurally defaulted the claim, and this Court may not consider its merits on habeas review. The Court therefore grants Respondent's motion for summary judgment as to Claim 3, ¶¶ 67-76, in its entirety.

E. Claim 4 – Gender Discrimination In The Selection Of The Grand Jury Foreperson Resulted In The Violation Of Petitioner's Fourteenth Amendment Due Process Right

Petitioner asserts that her Fourteenth Amendment right to due process was violated because gender discrimination systematically occurred in the selection of grand jury foremen, including the selection of the foreman for the grand jury that indicted her. In support of this claim, Owens presented evidence at trial that no woman was appointed as a grand jury foreperson for a Shelby County, Tennessee, Grand Jury from 1862 through September 16, 1985. *See* Addendum 1 at 261; Exs. 4, 5. Respondent maintains, however, that Petitioner procedurally defaulted this claim because it was not included in her

direct appeal to the Tennessee Court of Criminal Appeals or to the Tennessee Supreme Court.

A review of the record indicates that Petitioner in fact failed to present this claim at any time other than during the trial proceedings. The assertion of a claim during a trial does not satisfy the exhaustion requirement when it is not pursued on appeal. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

Owens next argues that her failure to exhaust this issue and the resulting procedural default should be excused based on counsel's ineffective assistance in failing to present this claim on appeal. In sum, she contends that she has established cause and prejudice sufficient to excuse the default based on ineffective assistance of counsel. A petitioner confronted with procedural default must show cause for the default and prejudice to obtain federal court review of his claim. *Teague*, 489 U.S. at 297-99; *Sykes*, 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman*, 501 U.S. at 752-53; *Murray*, 477 U.S. at 488. An ineffective assistance of counsel claim may be used to establish cause for procedural default. *Edwards*, 529 U.S. at 453. The ineffective assistance of counsel claim relied upon to prove cause, however, must not have been procedurally defaulted. *Id.* If the ineffective assistance of counsel claim was procedurally defaulted, the default may be excused if the defendant can establish cause and prejudice to that claim. *Id.*

A review of the record indicates that Petitioner did not raise in the state courts the ineffective assistance of counsel to present a constitutional claim based on gender discrimination in the selection of the grand jury foreperson. As such, Owens failed to exhaust this claim in the state court proceedings and is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting this claim. Furthermore, she has not shown cause for the default or prejudice resulting therefrom, as is required to obtain federal court review of this issue. Petitioner therefore may not rely on her claim of ineffective assistance of counsel to establish cause for the default of her gender discrimination argument. The Court finds that Petitioner has not established cause to excuse her procedural default, and this Court may not consider the merits of the claim on habeas review. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim ¶¶ 77-83.

F. Claim 5 – Petitioner's Conviction And Sentence Violate The Sixth, Eighth, And Fourteenth Amendments Because African-Americans Were Under-Represented On The Venire Due To Systematic Exclusion Of African-Americans From The Jury Selection Process And The State's Discriminatory Use Of Peremptory Challenges

Pursuant to *Duren v. Missouri*, 439 U.S. 357, 364 (1979), Petitioner asserts that a constitutional violation

occurred because African-Americans were under-represented on panels from which prospective jurors were drawn. Likewise, pursuant to *Batson v. Kentucky*, 46 U.S. 79 (1986), she maintains that the State unconstitutionally used its peremptory challenges to exclude African-Americans from the jury. The Warden asserts that Petitioner has procedurally defaulted these claims because they were not included in her appeal to the Tennessee Court of Criminal Appeals or the Tennessee Supreme Court. Petitioner maintains that she did not default them because Porterfield raised the claims in his appellate brief, and she adopted them by reference in her appellate brief.

Rule 27 of the Tennessee Rules of Appellate Procedure provides that "[i]n cases involving multiple parties . . . any party may adopt by reference any part of the brief of another party." Tenn. R. App. P. 27(j). Therefore, any claims raised by Porterfield in his appellate brief and adopted by reference by Petitioner were exhausted in the state courts, and as such are not procedurally defaulted.

The record indicates that Porterfield's brief included a claim based on the racial make-up of the venire. *See* Addendum 8 at 2, 22 (asserting that "[t]he jury panels offered in the present case contained an under-representation of blacks due to systematic exclusion of blacks in the jury selection process. . . ."). Furthermore, in her appellate brief, Petitioner adopted by reference various other claims raised by Porterfield. *See* Addendum 7 at 2 (adopting by reference issues I, II, III, IV, VI, XV, XVII, XIX from

Porterfield's brief); Addendum 8 at 2-4 (listing and describing issues presented for review by Porterfield). A review of Petitioner's brief, however, establishes that claim V, Porterfield's claim of racial discrimination, was not adopted by her. Moreover, the issue of the discriminatory use of peremptory challenges by the State was not asserted by either Porterfield or Owens. Thus, Petitioner failed to exhaust this claim in the state courts. Claim 5 is therefore procedurally barred.

Moreover, even if Petitioner were not procedurally barred from asserting this claim, the district court previously rejected the arguments raised in this claim. *See Porterfield v. Bell*, case no. 97-2362, Order On Respondent's Motion For Summary Judgment On The Habeas Corpus Petition And On Petitioner's Motion To Expand The Record, June 4, 1999, at pp. 31-34 ("*Porterfield* Order I"); Memorandum And Order Granting Respondent's Second Motion For Summary Judgment Denying Petitioner's Motion For Summary Judgment And Denying Petition For Writ Of Habeas Corpus, December 18, 2000 ("*Porterfield* Order II"). Specifically, the district court concluded that Porterfield "failed to develop the factual record" on his "*Duren* claim" (*see Duren*, 439 U.S. at 364) of systematic exclusion of African-Americans from the jury pool and that "[b]ecause he lack[ed] facts to establish a *Duren* violation, his claim must fail." *Porterfield* Order I at pp. 32, 33.

Although neither Petitioner nor Porterfield raised the issue of the State's alleged discriminatory

use of peremptory challenges, the district court determined that the Tennessee Supreme Court had addressed the issue and therefore it was deemed exhausted. *Porterfield* Order II, p. 15. The district court found, however, that Porterfield failed to exercise diligence in creating a sufficient record which did not support a prima facie case pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). *Porterfield* Order II, pp. 15, and 20-30. Given that the record of Petitioner's *Batson* claim is more insufficient than Porterfield's, Petitioner would not be entitled to relief even if this Court were to reach the merits of this issue. Moreover, Petitioner is not entitled as a matter of law to bring a *Batson* claim because *Powers v. Ohio*, 499 U.S. 400 (1991), the United States Supreme Court decision that permitted white defendants to object to the exclusion of blacks from their juries, was decided after Owens' conviction became final on direct appeal. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 5.

G. Claim 6 – Petitioner's Conviction And Sentence Violate The Sixth, Eighth, And Fourteenth Amendments Because The Jury Was Tainted By Pretrial Publicity And The Trial Court Precluded Counsel From Effectively Exploring Jurors' Knowledge Of The Case

Petitioner asserts that the jury was tainted because she was prevented from effectively exploring

the nature and extent of various jurors' knowledge of the case by the trial court. Respondent contends that Petitioner again procedurally defaulted this claim by failing to present it to the state courts. Owens did adopt this issue, Issue II of Porterfield, by reference in her brief. His brief, however, raised the claim of the tainted jury as a violation of the Sixth and Fourteenth Amendments. As Petitioner's assertion of a tainted jury is based upon an Eighth Amendment violation, it is procedurally defaulted as unexhausted in the state courts.

In *Porterfield* Order I, the district court determined that the Tennessee Supreme Court's factual conclusion that Porterfield and Owens did not suffer any prejudice from the denial of individual voir dire was not an unreasonable application of clearly established federal law as determined by the United States Supreme Court; nor were the Tennessee court's factual findings unreasonable. *Porterfield* Order I, pp. 29-30. Specifically, the state supreme court ruled that the trial court's denial of individual voir dire was not error because prospective jurors were questioned by the trial court about their knowledge of the case. *See Porterfield v. Bell*, 746 S.W.2d 441, 447 (Tenn. 1988). Furthermore, most of the jurors who had been exposed to pretrial publicity indicated that they were only vaguely familiar with the case. *Id.* The trial court also advised the jurors that they could consider only the evidence presented during the trial and excused those jurors who indicated they could not set aside what they already knew about the case. *Id.* This

Court finds, as in the *Porterfield* orders, that the state court's determination that neither Owens nor Porterfield suffered any prejudice from the denial of individual voir dire was not an unreasonable application of clearly established federal law as determined by the United States Supreme Court; nor were the Tennessee court's factual conclusions unreasonable. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 6.

H. Claim 7 – Petitioner's Conviction And Sentence Violate The Sixth, Eighth, And Fourteenth Amendments Because Prospective Jurors Were Exposed To A Reporter's Prejudicial Account Of The Proceedings

Owens alleges that the trial court's failure to declare a mistrial, after it was discovered that prospective jurors overheard a news reporter's account to his newspaper about the court proceedings, violated her Sixth, Eighth, and Fourteenth Amendment rights. Respondent asserts that Petitioner is procedurally barred from asserting this claim because she did not exhaust her state remedies. Petitioner adopted this claim by reference from Porterfield's brief.

The Court finds Petitioner has defaulted the claim. The district court in *Porterfield* Order I determined that in the state court proceedings Porterfield did not frame this claim in terms of a constitutional

violation. *See Porterfield* Order I, p. 30. Furthermore, Porterfield did not rely on state cases that used constitutional analysis in similar fact situations nor did he assert the claim in a manner so particular as to inform the state court that he was making a federal constitutional claim. *Id.* Accordingly, the state courts were not given a fair opportunity to consider the federal constitutional claim. *Id.* As such, Porterfield, and Owens by way of adoption of Porterfield's argument, defaulted the claim because it was not exhausted. It is now barred by Tennessee's post-conviction statute of limitations and waiver provisions.

Moreover, like the *Porterfield* district court, this Court notes that even if Owens could establish cause to excuse her default, Petitioner would not be entitled to habeas relief. *See id.* The trial judge questioned the prospective jurors concerning whether they overheard the news reporter's conversation and admonished them that news reports were not evidence. When several of the prospective jurors indicated that they had overheard the telephone call, Owens and Porterfield moved for a mistrial or in the alternative for a new jury panel. *See Porterfield v. Bell*, 746 S.W.2d 441, 447 (Tenn. 1988). The trial court denied the motion, but permitted individual voir dire on the incident. *Id.* The trial judge determined that those who were questioned individually had not overheard anything prejudicial or even substantial. *Id.* The trial court's finding is entitled to a presumption of correctness, and Petitioner has failed to develop a factual basis for disputing this claim. *See* 28 U.S.C.

§ 2254(e). Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 7.

I. Claim 8 – Petitioner's Conviction And Sentence Violate The Sixth, Eighth, And Fourteenth Amendments Because Prospective Jurors Were Exposed To Prejudicial Information During Group Voir Dire

Petitioner asserts that two comments made by prospective jurors during voir dire prejudiced the venire.[13] Respondent asserts that Petitioner failed to exhaust this claim in the state courts, despite her adoption of Porterfield's brief by reference. The Tennessee Supreme Court, when analyzing the merits of this issue, discussed it in the context of both Owens and Porterfield. *Porterfield*, 746 S.W.2d at 448. Despite Petitioner's adoption of the claim in the state court, it is defaulted.

In *Porterfield* Order I, the district court concluded that in the state court proceedings Porterfield did not frame this contention in terms of a

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[13] One prospective juror, in response to defense counsel's question, stated that a person serving a life term would only "stay in there" a certain amount of time. When asked about his knowledge of the case, another potential juror stated that his wife read the papers and told him of the important items. He further said, "I just know what went down, and I know that there is a case." Both prospective jurors were peremptorily dismissed.

constitutional violation despite having raised the issue of jury prejudice based on the comments of the prospective jurors. *See Porterfield* Order I, p. 30. Furthermore, Porterfield did not rely on state cases that used constitutional analysis in similar fact situations nor did he assert the claim in a manner so particular as to inform the state court that he was making a federal constitutional claim. *Id.* Accordingly, the state courts were not given a fair opportunity to consider the federal constitutional claim. *Id.* This Court agrees with the *Porterfield* court's conclusion. As such, Porterfield, as well as Owens, have defaulted this issue because it was not exhausted. Likewise, the claim is now barred by Tennessee's post-conviction statute of limitations and waiver provisions.

Moreover, the Court agrees with the *Porterfield* district court's finding that even if Porterfield, and therefore Owens, could establish cause to excuse their default, they are not entitled to relief. *See Porterfield* Order I, p. 31. Petitioner failed to show that the jury which was selected was prejudiced or biased by the statements of the two prospective jurors. *See Porterfield,* 746 S.W.2d at 447-48. Furthermore, the Tennessee courts determined that these comments did not prejudice either Owens or Porterfield. *See Porterfield,* 746 S.W.2d at 447-48 (stating that "[t]he comments did not in any way affect the presumption of innocence or in any way lessen the burden of the state to prove its case."). Petitioner, like Porterfield, has established no reason for this Court to cast doubt on the Tennessee Supreme Court's conclusions.

Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 8.

J. Claim 9 – The Trial Court Violated Petitioner's Sixth, Eighth, And Fourteenth Amendment Rights By Denying Her Request For Individual, Sequestered, Voir Dire

Petitioner contends that the venire was tainted by prejudicial pretrial publicity, and the trial judge erred by not allowing individual, rather than group, voir dire. Respondent asserts that Petitioner failed to exhaust this claim in the state courts, despite her adoption of Porterfield's brief on this argument. The Tennessee Supreme Court, when analyzing the merits of this claim, discussed it in the context of both Owens and Porterfield. To the extent that it was raised in the state courts by Porterfield's brief, this Court finds that Owens exhausted the claim, and thus it is not procedurally barred.

Porterfield presented this argument as a violation of the Sixth and Fourteenth Amendments. The state courts, therefore, did not have an opportunity to consider the individual voir dire claim in the Eighth Amendment context. Accordingly, Petitioner procedurally defaulted any claimed violation of the Eighth Amendment based on the trial court's denial of individual, sequestered voir dire.

The district court in *Porterfield v. Bell*, No. 97-2362 (W.D. Tenn. 1999), considered this same issue.

The *Porterfield* district court concluded that the Tennessee Supreme Court's ruling that Owens and Porterfield did not suffer any prejudice from the trial court's denial of individual voir dire was not an unreasonable application of clearly established federal law as found by the United States Supreme Court; nor were the Tennessee Supreme Court's factual determinations unreasonable. *See Porterfield* Order I, pp. 29-30. This Court concurs with the *Porterfield* district court.

Potential jurors need not be completely ignorant of the facts and issues of a case. *See Murphy v. Florida,* 421 U.S. 794 (1975). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 800. The Tennessee court determined that the trial court's denial of individual voir dire was not an error because the trial court questioned the prospective panel about their prior knowledge of the case. *See Porterfield,* 746 S.W.2d at 447. Most of the potential jurors who were exposed to pretrial publicity stated that they only vaguely recalled what they had heard or read. *Id.* Moreover, the trial court admonished the jurors that they were to consider only the evidence presented during trial and excused those who could not lay aside what they already knew. *Id.* After a review of the record, this Court concludes that the Tennessee court's determinations were not an unreasonable application of clearly established federal law, nor were its factual findings unreasonable. *See* 28 U.S.C. § 2254(d). Accordingly, the Court grants

Respondent's motion for summary judgment as to Claim 9.

K. Claim 10 – The Trial Court Violated The Sixth, Eighth, And Fourteenth Amendments By Striking For Cause Prospective Jurors

Owens argues that the trial court's dismissal for cause of prospective jurors, who indicated that they had reservations about the death penalty, was a violation of the Sixth, Eighth, and Fourteenth Amendments. Specifically, Petitioner points to the trial court's dismissal of Charlayne Pickett and Dorothy Newberry. Respondent asserts that Petitioner has procedurally defaulted the claim because she merely relied on the brief filed by Porterfield. As previously noted, adoption of a co-party's brief by reference, however, is permitted under Tennessee law. Furthermore, the Tennessee Supreme Court, when analyzing the merits of the claim, discussed it in the context of both Owens and Porterfield. *See Porterfield,* 746 S.W.2d at 447 (stating that "[e]xception was taken by the defendants to the exclusion of a prospective juror, Charlayne Pickett, for cause."). Therefore, to the extent that the claim was raised in the state courts by Porterfield's brief, the Court finds that Petitioner

exhausted the claim, and is not procedurally barred from raising it.[14]

A prospective juror who is categorically unwilling to impose a sentence of death in a capital case may be excused for cause. *See Lockhart v. McCree,* 476 U.S. 162 (1986); *see also Wainwright v. Witt,* 469 U.S. 412, 424 (1985) (permitting dismissal of a prospective juror where the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."). A prospective juror who does not favor the death penalty but is willing to set aside his personal views in accordance with the law may serve on a capital jury. *See Lockhart,* 476 U.S. at 176. If a juror is unwilling or unable to properly and impartially apply the law to the facts of the case during both the guilt and sentencing phases of a capital trial, the prospective juror may be excluded. *Id.* at 175-77.

Pickett indicated that she would consider the defendants' guilt or innocence based on the facts, but she would automatically vote against the imposition of death in any case. *See* Addendum 4. Like the *Porterfield* district court, this Court concludes that based on the juror's statement, the decision of the trial court to strike Pickett for cause was not an

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[14] Petitioner exhausted her claim as to Charlayne Pickett. However, Petitioner's claims that other prospective jurors were improperly excluded based on their views of the death penalty are defaulted because they were not presented to the state courts and are now barred by the statute of limitations.

unreasonable application of federal law. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 10.

L. Claim 11 – The Trial Court Violated The Sixth, Eighth, And Fourteenth Amendments By Failing To Strike For Cause Prospective Jurors Including Rhea Benson And Richard Piercing

Petitioner contends that the trial court erred by failing to strike for cause prospective jurors who could not consider imposing a sentence of life imprisonment upon a finding of guilt. A review of the record indicates that Petitioner did not raise the issue in the state courts. Moreover, she does not allege that cause or prejudice exists to overcome the procedural default. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 11.

M. Claim 12 – Petitioner's Death Sentence Violates The Sixth, Eighth, And Fourteenth Amendments Because One Of The Jurors Falsely Testified During Voir Dire That She Could Consider Imposing A Life Sentence

Petitioner asserts that Dora S. Jehl falsely testified during voir dire that she could consider a sentence of life imprisonment if Petitioner was convicted. A review of the record indicates that Petitioner failed to exhaust this claim in the state court

proceedings and, thus, is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting this claim.[15] Accordingly, Petitioner has procedurally defaulted the claim, and this Court may not consider its merits on habeas review. The Court therefore grants Respondent's motion for summary judgment as to Claim 12.

N. Claim 13 – The Trial Court Violated The Sixth, Eighth, And Fourteenth Amendments By Allowing The Introduction Of Porterfield's February 22, 1985 Statement

Petitioner claims that the trial court allowed the introduction of Porterfield's statement that he killed Mr. Owens after being asked by Petitioner in violation of *Bruton v. United States,* 391 U.S. 123 (1968), and its progenies. A review of the record indicates, however, that Petitioner failed to raise a *Bruton* issue in the state court proceedings.

Owens relies on her direct appeal brief, Porterfield's direct appeal brief, pre- and post-trial motions, and *Porterfield,* 746 S.W.2d 441 (Tenn. 1988), to establish that she exhausted this claim in the state courts. The Court reviewed each of these in turn. Her direct appeal brief did not raise a *Bruton* issue.

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[15] Petitioner admits in her Traverse that she failed to present evidence to support Claim 12 during her post-conviction proceeding. *See Owens v. Guida,* No. 00-2765, Traverse at 5.

Petitioner did challenge the trial court's denial of her severance motion, however, the challenge did not raise the issue of the admission of Porterfield's statement nor did it mention *Bruton*. *See* Addendum 7 at 6-8. Furthermore, the Tennessee Supreme Court, after discussing Porterfield's *Bruton* claim, stated that Petitioner did not raise a *Bruton* issue. *See Porterfield,* 746 S.W.2d at 446 (stating that "[w]hile not raising a *Bruton* issue, Mrs. Owens insists she was prejudiced by having to try her case with that of Mr. Porterfield as it prevented her from pleading guilty and taking a proffered life sentence.").

Petitioner's reliance on Porterfield's direct appeal brief likewise fails to establish that the claim was exhausted in the state courts. Porterfield did raise a *Bruton* issue on direct appeal, but it related solely to the introduction of Petitioner's statement, not Porterfield's statement. *See* Addendum 8 at 24-27. Moreover, she did not adopt by reference this portion of Porterfield's direct appeal brief.

The Court finds that Petitioner failed to exhaust this claim in the state court proceedings and is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting this claim. Therefore, Petitioner has procedurally defaulted the claim, and this Court may not consider it on habeas review. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 13.

O. Claim 14 – The Guilt Stage Instructions Violated The Sixth, Eighth, And Fourteenth Amendments

Owens maintains that various instructions given by the trial court during the guilt stage were error. Specifically, Petitioner alleges that the trial court erred by 1) equating the concept of reasonable doubt with moral certainty; 2) instructing the jury that the law presumes that witnesses testify truthfully; and 3) instructing the jury that intent or design to kill may be conceived and deliberately formed in an instant, and a person may be guilty of deliberate murder even though he was controlled by passion at the time of the homicide. The Court will address each instruction in kind.

At the guilt phase, the trial court instructed the jury that

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

Addendum 5 at 27. On appeal from the denial of post-conviction relief, the Tennessee Court of Criminal Appeals held that these instructions did not fall

below the requirements of the Due Process Clause. *See Owen,* 13 S.W.3d at 765. In so holding, the court noted that such instructions have been upheld on numerous occasions. *Id.* Among the cases relied upon by the court was *Austin,* 126 F.3d at 846-47, in which the Sixth Circuit ruled that such an instruction did not lower the constitutional burden of proof. The *Austin* Court determined that a reasonable doubt instruction like that found in this case was "more like the acceptable language in *Victor* [*v. Nebraska,* 511 U.S. 1 (1994)], than the unacceptable language in *Cage* [*v. Louisiana,* 498 U.S. 39 (1990)]." *Austin,* 126 F.3d at 847. The *Austin* Court noted that "[t]he language of an 'inability to let the mind rest easily' lends content to the phrase 'moral certainty' similar to the 'abiding conviction' language in *Victor,* increasing, if anything, the prosecutor's burden of proof." *Id.* As such, the *Austin* Court held that the "moral certainty" reasonable doubt jury instruction did not violate the United States Constitution.

The "moral certainty" jury instruction at issue in this case is virtually identical to the one in *Austin.* This Court concludes, therefore, that the decision of the state court was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court; nor were the Tennessee court's factual determinations unreasonable. *See* 28 U.S.C. § 2254(d). Accordingly, the Court grants Respondent's motion for summary judgment as to the "moral certainty"

reasonable doubt jury instruction issue found in Claim 14.

Owens also asserts that the trial court erred by instructing the jury to presume that witnesses testify truthfully, that intent or design to kill may be formed in an instant, and that a person may deliberate even when controlled by passion. Petitioner failed to raise these issues in the state courts.

As such, the Court finds that Petitioner did not exhaust these claims in the state court proceedings. They are now barred by Tennessee's post-conviction statute of limitations and waiver provisions. Therefore, Petitioner has procedurally defaulted the claims, and this Court may not consider their merits on habeas review. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 14.

P. Claim 15 – The Trial Court Violated The Sixth, Eighth, And Fourteenth Amendments By Not Allowing Petitioner To Present Evidence At The Sentencing Hearing

Petitioner asserts that the trial court erred when it refused to allow her to present certain evidence in mitigation during the sentencing hearing. The omitted evidence includes 1) that Petitioner wanted to plead guilty in exchange for a sentence of life but was not allowed to do so because the State's offer required Porterfield also to plead guilty, which he refused to

do; 2) the testimony of Dr. Max West concerning Petitioner's family background; and 3) the testimony of Elizabeth Bratcher that Petitioner loved her children. The Court will discuss each of these claims individually.

The State offered Petitioner a sentence of life in return for a plea of guilty provided that Porterfield also plead guilty. During the sentencing phase, Petitioner attempted to present to the jury her willingness to plead guilty as mitigation evidence. *See* Addendum 4 at 1899. The trial court denied the request, *id.* at 1900, which was affirmed by the Tennessee Supreme Court on direct appeal. *See Porterfield,* 746 S.W.2d at 449. The state supreme court determined that pursuant to *Lockett,* 438 U.S. 586, and *Cozzolino,* 584 S.W.2d 765, the trial court was not required to admit this evidence during the sentencing phase. The state court concluded that Petitioner's "interest in accepting a plea bargaining offer is not relevant to either the issue of punishment or to any mitigating factor raised by Petitioner. . . ." *Porterfield,* 746 S.W.2d at 449.

In *Lockett,* the United States Supreme Court held that a capital sentencer may not be precluded from considering any aspect of the defendant's character, record, or circumstances of the offense in mitigation. *Lockett,* 438 U.S. at 604. Courts may, however, "exclude, as irrelevant, evidence not bearing" on those factors. *Id.* In Tennessee, "evidence is relevant to the punishment only if it is relevant to a statutory aggravating circumstance or to a mitigating factor

raised by the defendant." *Porterfield,* 746 S.W.2d at 449 (citing *Cozzolino,* 584 S.W.2d at 768). The Court finds that the state court's ruling that evidence concerning a plea bargain was irrelevant to any mitigating factor raised by Petitioner, and thus properly excluded, does not contravene *Lockett.* As such, the decision was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d). The Court therefore grants Respondent's motion for summary judgment as to Claim 15, ¶¶ 131-37, 145.

Owens' next claim of error concerning the sentencing phase relates to the testimony of Dr. West, a psychiatrist who evaluated Petitioner on one occasion. She asserts that the trial court erred when it sustained the prosecution's hearsay objection to defense counsel's questioning of Dr. West concerning Petitioner's family background. The record reveals, however, that she did not raise this issue on direct appeal or during post-conviction proceedings. Petitioner did raise the issue of Dr. West's testimony in relation to her claim of ineffective assistance of counsel. This, however, did not provide the state courts an opportunity to examine Petitioner's claim of a constitutional violation based on the trial court's ruling on the hearsay objection to Dr. West's testimony.

Likewise, Owens did not pursue in the state courts a claim that the trial court erred by sustaining a hearsay objection to the testimony of Elizabeth

Bratcher as to whether she had an impression about Petitioner's feelings for her children. Additionally, Petitioner did not use the trial court's ruling to support her claim of ineffective assistance of counsel. Therefore, Petitioner failed to give the state courts an opportunity to determine whether a constitutional violation resulted from the exclusion of Bratcher's testimony.

The Court finds that Petitioner failed to exhaust these claims in the state court proceedings and is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting them. Therefore, she has procedurally defaulted the claims, and this Court may not consider them on habeas review. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 15.

Q. Claim 16 – The Prosecution Violated The Sixth, Eighth, And Fourteenth Amendments By Stating That It Did Not Intend To Introduce The Morgue Photographs And Later Introducing Them During The Sentencing Stage

During voir dire, the prosecution told the court and defense counsel that they did not intend to introduce morgue photographs of Mr. Owens. During the sentencing phase, however, the prosecution introduced two such photographs over the objection of the defense counsel. Petitioner asserts that the probative value of the photographs was outweighed by their

prejudicial effect and that their introduction violated the prosecution's oral stipulation.

On direct appeal, Petitioner adopted this claim by reference from Porterfield's brief as permitted by Rule 27 of the Tennessee Rules of Appellate Procedure. Likewise, when ruling on the claim, the Tennessee Supreme Court referenced the claim as that of Petitioner's and Porterfield's. *See Porterfield,* 746 S.W.2d at 449. Accordingly, Petitioner exhausted the claim in the state courts, and this Court may review it.

When considering the issue of whether the photographs were unduly prejudicial, the Tennessee Supreme Court stated that

> [t]he photographs in question were relevant to proving one of the statutory aggravated circumstances – that is, whether the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind. While undoubtedly prejudicial to the defendants, in the sentencing stage of the proceedings and in view of the aggravating circumstance alleged, they were highly probative of the nature and extent of the injuries inflicted upon Mr. Owens.

Id. at 450. The prosecution is prohibited from presenting evidence intended to appeal purely to passion rather than reason. *See Gardner v. Florida,* 430 U.S. 349, 358 (1977). As the Tennessee Supreme Court determined, however, the photographs were highly probative to an aggravating circumstance. Thus, this

Court concludes, as did the district court in *Porterfield* when considering this issue, that the state court's decision is not contrary to clearly established federal law, nor is it an unreasonable finding of fact. *See Porterfield* Order I at 52.

With respect to the prosecution's pretrial representation that they did not intend to introduce the photographs, the state court determined that the oral stipulation made by the prosecution related to the guilt phase of the trial. *Porterfield,* 746 S.W.2d at 450. The court concluded therefore that the prosecution's statement did not foreclose the possibility that the photographs would be used in the sentencing phase. *Id.* Petitioner has failed to establish how the state court's decision was either contrary to or an unreasonable application of federal law. *See Porterfield* Order I at 53 (holding that Porterfield failed to establish a violation of federal law with respect to the prosecution's oral stipulation). Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 16.

R. Claim 17 – The Prosecution's Opening Statement And Closing Argument At Sentencing Violated The Sixth, Eighth, And Fourteenth Amendments

Petitioner asserts that certain statements and arguments offered by the prosecution during its opening and closing statements were constitutionally prohibited. Specifically, during its opening remarks,

the prosecution allegedly implied that the defense had the duty to prove mitigation. The prosecution also purportedly asserted in its closing statement that executing Petitioner would deter others from committing murder, despite the fact that no evidence was presented during the trial to support that proposition.

A review of the record indicates that Petitioner failed to raise these claims in the state courts. Porterfield raised these issues in the state court proceedings, however, Petitioner did not adopt by reference this portion of Porterfield's brief. *See* Addendum 7 at 2 (Petitioner's direct appeal brief adopting by reference issues I, II, III, IV, VI, XV, XVII, and XIX from Porterfield's direct appeal brief); *see also* Addendum 8 at 3 (Porterfield's direct appeal brief asserting in issue XVI that prosecutor's opening and closing statements contained improper arguments). Petitioner maintains that ineffective assistance of counsel establishes cause to overcome this default.

In order to utilize a claim of ineffective assistance of counsel to establish cause, the claim of ineffective assistance itself must have been exhausted in the state courts. *See Edwards,* 529 U.S. at 452-53. In the state court proceedings, Petitioner's claims of ineffective assistance of counsel included allegations that counsel failed to: (1) adequately investigate for mitigation evidence; (2) properly request expert services; (3) request investigative assistance; (4) appropriately manage the trial testimony of Dr. West; (5) request

a continuance when the State failed to comply with the notice provisions regarding aggravating circumstances; (6) object to the murder for hire aggravating circumstance, (i)(4), as double enhancement; (7) object to the vicarious application of the heinous, atrocious, and cruel aggravating factor; and (8) request a clarifying instruction regarding intent to inflict serious physical abuse in the (i)(5) aggravating circumstance. *See Owens,* 13 S.W.3d at 749.

Petitioner did not present the state courts with a claim of ineffective assistance of counsel based on counsel's failure to raise a claim of improper statements by the prosecution during the opening and closing remarks. The Court finds therefore that Petitioner has not established cause to overcome her default. Accordingly, the claim is defaulted because Petitioner failed to exhaust her state remedies and is now barred by the Tennessee post-conviction statute from doing so. The Court grants Respondent's motion for summary judgment as to Claim 17.

S. Claim 18 – The Trial Court's Sentencing Stage Instructions Violated The Sixth, Eighth, And Fourteenth Amendments

Petitioner asserts that the jury instructions given during the sentencing phase resulted in numerous constitutional violations. She maintains that the trial court's instructions were unconstitutional because they 1) equated reasonable doubt with moral certainty;

2) indicated that a life sentence requires a unanimous verdict; 3) did not instruct that if the jury could not unanimously agree on a sentence, then Petitioner would automatically be sentenced to life; 4) could have been interpreted as requiring the jury to unanimously find mitigating circumstances; 5) failed to instruct the jury that it had to conclude that Petitioner intended to have the victim die a heinous, atrocious, or cruel death in order to find the HAC aggravating circumstance; 6) failed to instruct the jury that it could sentence Petitioner to life imprisonment even if it sentenced Porterfield to death; and 7) instructed the jury that it should not let sympathy affect its judgment. Petitioner also contends that the trial court erred because it did not instruct the jury that it was to presume that a life sentence would result in a lifetime of imprisonment after a prospective juror stated in group voir dire that a life sentence does not result in such.

The sentencing instructions given by the trial court provided that

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict.

Addendum 5 at 39. The trial court also instructed the jury that

> If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the State, beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstance, the sentence shall be death.
>
> The jury shall state, in writing, the statutory aggravating circumstance or statutory aggravating circumstances so-found and signify, in writing, that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so-found.
>
> You will write your findings and verdict upon the enclosed forms attached hereto and made a part of this charge. Your verdict shall be as follows:
>
> (1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances: The jury will then list the statutory aggravating circumstance or circumstances so-found beyond a reasonable doubt.
>
> (2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

> (3) Therefore, we, the jury, unanimously find that the punishment shall be death.
>
> The verdict must be unanimous, and each juror must sign their name beneath the verdict.

Id. A finding of life imprisonment was then explained in the jury instructions:

> If you unanimously determine that no statutory aggravating circumstance has been proven by the state, beyond a reasonable doubt; or if the jury unanimously determined that a statutory aggravating circumstance or circumstances have been proved by the state, beyond a reasonable doubt, but that the said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.
>
> The verdict should be as follows: We, the jury, unanimously find that the punishment shall be life imprisonment.
>
> The verdict must be unanimous and signed by each juror. The juror, in no case, should have sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict. They should render their verdict

> with absolute fairness and impartiality as they think truth and justice dictate.

Id. at 42-44.

During post-conviction proceedings, Petitioner asserted that the sentencing phase jury instructions were given in error because they equated reasonable doubt to moral certainty. As discussed in Claim 15, the Tennessee Court of Criminal Appeals held that the "reasonable doubt" jury instruction given during the sentencing and guilt phases did not fall below the requirements of the Due Process Clause. *See Owens,* 13 S.W.3d at 765. In so holding, the Court of Criminal Appeals noted that such instructions have been upheld on numerous occasions. *Id.* Among the cases relied upon by the court was *Austin,* 126 F.3d at 846-47, in which the Sixth Circuit ruled that such a "reasonable doubt" instruction did not lower the constitutional burden of proof.

The reasonable doubt jury instruction at issue in this case is virtually identical to the one at issue in *Austin.* This Court reiterates, therefore, that the decision of the Court of Criminal Appeals was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court; nor were the Tennessee court's factual determinations unreasonable. *See* 28 U.S.C. § 2254(d). Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 18, concerning whether the reasonable doubt jury instruction

given during the sentencing stage resulted in a constitutional violation.

Petitioner next asserts that the jury instructions are unconstitutional because they indicated that a life sentence requires a unanimous verdict, and the jury was not instructed as to the effect of its inability to unanimously agree on a verdict. Additionally, Petitioner submits that the sentencing phase instructions could have been interpreted as requiring the jury to unanimously find mitigating circumstances. On post-conviction appeal, the court of criminal appeals summarily rejected each of these arguments. *See Owens,* 13 S.W.3d at 766. The court concluded that "these [i]ssues have been repeatedly rejected by [the Tennessee Supreme Court]." *Id.*

In *Coe*, 161 F.3d 320 (6th Cir. 1998), the Sixth Circuit considered the issues presented by Petitioner concerning the requirements and perceived requirements of unanimity in jury deliberations.[16] In *Coe*, the Court examined whether jury instructions similar to those at issue were unconstitutional because the jurors were not told that Coe would receive a life sentence if they failed to reach a unanimous verdict.[17]

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[16] The Court recognizes that *Coe* was a pre-AEDPA case. The adoption of the AEDPA, however, does not implicate the holdings made by the *Coe* court with respect to the issues raised by Petitioner concerning unanimity in the sentencing phase jury instructions.

[17] The sentencing phase jury instructions given in *Coe* are virtually identical to those given to the jury in the instant action

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Coe, 161 F.3d at 339. The court determined that the jury instructions were constitutionally sound despite the fact that the jury was given incomplete information. *Id.* at 340. In so deciding, the court reasoned that "it does not necessarily mislead a jury regarding its role to avoid disclosing what will happen if the jury fails to achieve unanimity." *Id.* Furthermore, the court noted that "the very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Id.* (quoting *Lowenfield v. Phelps,* 484 U.S. 231 (1988)). Accordingly, the failure of the trial court to instruct the jury concerning its inability to reach a unanimous verdict did not unconstitutionally "deceive the jury and infect the verdict with unreliability." *Id.*

Moreover, in *Jones v. United States,* 527 U.S. 373 (1999), the Supreme Court held that the Constitution does not require that a jury in every capital case be instructed as to the consequences of a breakdown in the deliberative process *Jones*, 527 U.S. at 382-83. The *Jones* court additionally noted that various federal courts of appeals have rejected a constitutional unanimity requirement or a requirement of a jury instruction as to the import of a less than unanimous verdict. *Id.* at 382, n.6. This Court concludes therefore that non-unanimity jury instructions are

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with the only differences being stylistic. *See Coe*, 161 F.3d at 336-37.

not required in capital cases nor must the jury be instructed as to the result should they fail to reach a unanimous verdict. The state court's determination that the sentencing phase jury instructions did not violate Petitioner's constitutional rights is neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Accordingly, the Court grants Respondent's motion for summary judgment as to Petitioner's assertions in Claim 18 that the sentencing phase jury instructions which instructed the jury that it must unanimously agree to a life sentence but did not explain to the jury the effect of a non-unanimous verdict are unconstitutional.

Owens next contends that the sentencing phase instructions are unconstitutional because the jury could have interpreted them as requiring a unanimous finding as to mitigating circumstances. In *Coe*, the Sixth Circuit considered whether jury instructions similar to those at issue in this case were unconstitutional. *Coe*, 161 F.3d at 337. The *Coe* court determined that such instructions do not violate *Mills v. Maryland*, 486 U.S. 367, 373-75 (1988), which held that in reviewing the constitutionality of such instructions, the proper inquiry is whether a reasonable jury might have interpreted the instruction in a way that is constitutionally impermissible. *Coe*, 161 F.3d at 337. The *Coe* court reasoned that the jury instructions "require[d] unanimity as to the results of the *weighing*, but this [was] a far different matter than requiring unanimity as to the *presence* of a

mitigating factor." *Id.* at 338 (emphasis in original). Accordingly, the court concluded that nothing in the language of the jury instructions could reasonably be taken to require unanimity as to the presence of a mitigating factor. *Id.* Given the similarity in the sentencing phase instructions in *Coe* and in this case, the Court concludes that the state court's decision was not an unreasonable application of federal law as determined by the United States Supreme Court. Accordingly, the Court grants Respondent's motion for summary judgment of Claim 18 relating to the perceived unanimity requirement in finding mitigating circumstances.

Petitioner next asserts that the sentencing stage instructions were unconstitutional because they failed to instruct the jury that it had to find that Petitioner intended to have the victim die a heinous, atrocious, or cruel death in order to impose the HAC aggravating circumstance.

Respondent states that Petitioner's only assertion of error as to the HAC aggravator was that "trial counsel was constitutionally ineffective under the Sixth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution for not challenging the HAC instructions as applied to Ms. Owens." *See* Addendum 14 at 68; Addendum 18 at 8. A review of the record, however, indicates that Petitioner challenged the application of the HAC aggravator to her case during post-conviction proceedings. *See* Addendum No. 14 at 63-69; Addendum 18 at 1-8.

When considering Petitioner's HAC aggravator claim, the Tennessee Court of Criminal Appeals determined that Owens waived the claim because she failed to raise it on direct appeal. *See Owens*, 13 S.W.3d at 761. Nevertheless, the court proceeded to address the issue of the vicarious application of the HAC aggravator to Owens' case on the merits. *Id.* Petitioner asserts therefore that the claim is not procedurally defaulted.

It is unclear whether the appellate court denied Petitioner post-conviction relief on this claim based on waiver or based on its analysis of the issue. For this reason, the Court finds that it may consider her claim.

Petitioner in short argues that the Constitution prohibits the imposition of capital punishment based on the conduct of an accomplice, and the trial court should have therefore instructed the jury that a finding of intent was required as to the HAC aggravator. She maintains that because there is no proof to establish that she directed Porterfield to kill Mr. Owens by bludgeoning him to death, Porterfield's acts cannot be attributed to her.

The state court considered Petitioner's claim in view of *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). The state court initially noted that in *Enmund*, the United States Supreme Court held that a non-participating accomplice, in other words, a non-triggerman could not receive the death penalty. *Owens*, 13 S.W.3d at

760. The state court further recognized *Enmund*'s holding that "[t]he focus must be on [the defendant's personal] culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" *Id.* (quoting *Enmund*, 458 U.S. at 798 (internal citations omitted)).

The state court then turned to *Tison* in which the Supreme Court considered another felony murder case based upon accomplice liability. The appellate court noted that *Tison* "refined the *Enmund* intent rule and held that 'major participation in the felony committed, combined with reckless indifference to human life' demonstrated culpability sufficient for execution." *Id.* (quoting *Tison*, 481 U.S. at 158). Thus, *Tison* made many defendants convicted of felony murder, both triggermen and non-triggermen, death eligible. *Owens*, 13 S.W.3d at 760.

The Tennessee court determined that, despite the holding in *Tison*, the issue of the vicarious application of aggravating circumstances had not been addressed. *Id.* at 761; *but see State v. Tison*, 129 Ariz. 526, 633 P.2d 335, 354 (1981), *cert. denied*, 459 U.S. 882 (1982) (death penalty affirmed to nontriggerman where "heinous atrocious cruel" and pecuniary gain aggravating circumstances applied vicariously). The appellate court found that the "*Enmund-Tison* holding addresses only whether a non-triggerman may be sentenced to death; it does not address whether the conduct of the triggerman may be used

to aggravate the sentence of the non-triggerman." *Owens*, 13 S.W.3d at 760. The court therefore determined it was necessary to consider the issue given that the United State Supreme Court had not addressed it. *Id.*

In assessing the issue, the state court initially noted that no Tennessee case had previously decided "whether a convicted murderer, who took no part in the killing itself and was unaware as to how it was to be accomplished, [could] be sentenced to death based upon the 'heinous, atrocious, and cruel' aggravating circumstance."[18] *Id.* The court determined that the Tennessee Supreme Court, although not directly ruling on the issue, had implicitly upheld the vicarious application of the HAC aggravator. *Id.* The court then concluded that a non-triggerman defendant can be held vicariously liable for an aggravating circumstance following an *Enmund-Tison* determination. *Id.* at 762.[19]

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[18] In other words, the question remained of "whether an aggravating factor may be applied vicariously to a defendant if he was not the actor responsible for the particular aggravating circumstance," even though a defendant may be death eligible following a determination of "major participation combined with reckless indifference to human life" under *Enmund-Tison*. *Owens*, 13 S.W.3d at 761.

[19] As noted in *Owens* Order I, the Tennessee Supreme Court has now adopted the holding of the court of criminal appeals in *Owens*, holding that the HAC aggravating circumstance may be vicariously applied to a co-defendant who is not responsible for

(Continued on following page)

In so doing, the state court noted the decisions of other federal and state courts which had considered the issue. *Id.*; *see, e.g., White v. Wainwright*, 809 F.2d 1478, 1485 (11th Cir. 1987) (death penalty upheld based upon vicarious application of heinous, atrocious cruel factor since defendant was armed and on scene as active participant in robbery); *Ex parte Bankhead*, 585 So. 2d 112, 125 (Ala. 1991) ("heinous atrocious cruel" aggravating circumstance upheld based on manner of killing and not on defendant's actual participation); *Haney v. State*, 603 So. 2d 368, 380-381, 385-387 (Ala. Crim. App. 1991) (appellant admitted paying co-defendant to kill her husband and giving him instructions on how to approach her home without being observed); *Fox v. State*, 779 P.2d 562, 578 (Okla. Crim. App. 1989) (death penalty supported by evidence that defendant armed himself with shotgun and shells before robbing grocery store with co-defendant where three people were killed).

The state court then considered the facts of the case as applied to Owens in making its *Enmund-Tison* determination. In finding that Petitioner was death eligible under *Enmund-Tison*, the court concluded that

> [t]he appellant willingly and knowingly associated herself with others for the purpose of effecting a premeditated murder upon her

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the manner of death of the victim. *See Owens* Order I at 16-17; *State v. Robinson*, 146 S.W.3d 469, 500 (Tenn. 2004).

husband resulting in his heinous, atrocious, and cruel death. The proof gleaned from her confession and testimony of eyewitnesses demonstrated that she repeatedly gave several men large sums of money to effectuate that criminal purpose. She supplied these men with photographs of her husband, his car, and their home, as well as a diagram of his parking space at work. Moreover, she personally drove her co-defendant by her home and her church ordering him to make the crime appear to be a burglary/robbery. She gave her co-defendant a key to her house, met with him the afternoon of the murder, and went to church with her husband that evening. The appellant refused to allow her children to remain at church with their father to play basketball that evening; she took them to her sister's home and played games in order for the murder to occur. Upon her later arrival at her home, despite obvious signs of the crime, she allowed her children to enter into the house to find their murdered father. This proof evinces the appellant's participation combined with reckless indifference. Accordingly, the appellant is death eligible under *Enmund-Tison*.

Id.

The court went on to state that

eligibility for capital punishment via vicarious liability, however, is not absolute; rather, it is subject to statutory limitations.

Tennessee has chosen to constitutionally narrow the class of death eligible defendants by statutorily enumerating a number of specific aggravating circumstances and expressly requiring the finding of at least one aggravating circumstance beyond a reasonable doubt before the death penalty can be imposed. *See* Tenn. Code Ann. § 39-2-203(g) (1982); *see also Middlebrooks*, 840 S.W.2d at 344. [footnote omitted]. In the present case, the State must prove that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind," Tenn. Code Ann. § 39-2-203(i)(5) (emphasis added), in order to establish the presence of the aggravating circumstance at issue. The plain language of this provision, "read in context of the entire statute, without any forced or subtle construction which would extend or limit its meaning," *State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998); *cert. denied*, 525 U.S. 967, 119 S. Ct. 414, 142 L. Ed. 2d 336 (1998) *see also State v. Johnson*, 970 S.W.2d 500, 505 (Tenn. Crim. App. 1996), *perm. to appeal denied*, (Tenn. 1997), clearly focuses on the murder itself and not the defendant's own actions or intent. *Cf. State v. Hall*, 976 S.W.2d 121, 134 (Tenn. 1998), *cert. denied*, 526 U.S. 1989, 119 S. Ct. 1501, 143 L. Ed.2d 654 (1999) (plain language of (i)(8) aggravator, during defendant's escape from lawful custody, adhered to in construing legislative intent). After examination of this issue, we conclude that it was the legislature's

> intent that the (i)(5) aggravator impute liability upon a defendant for conduct for which he or she is criminally responsible. This aggravator, by its plain language, clearly encompasses consideration of the nature and circumstances of the crime itself, which would permit such a vicarious application. [footnote omitted] *Cf. Ex parte Bankhead*, 585 So. 2d at 125 ('heinous atrocious cruel' aggravating circumstance upheld based on the manner of killing and not on defendant's actual participation). The emphasis in the (i)(5) aggravator is on the manner of killing, not on the defendant's actual participation. When the defendant contracts for another to commit murder and that murder is committed in a heinous, atrocious, and cruel manner, we conclude that this aggravator may appropriately be applied in imposing a sentence of death. We hold that the factual application of the heinous, atrocious, and cruel aggravating circumstance is supported by the proof in this case. This issue is without merit.

Id. at 762-63.

The state court's ruling does not conflict with *Enmund*, 458 U.S. 782 or *Tison*, 481 U.S. 137. Moreover, the court's determination that the HAC aggravator may be applied vicariously if supported by an *Enmund-Tison* determination is not an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. The trial court therefore was not

required to instruct the jury that a finding of intent was required. Accordingly, the Court grants Respondent's motion for summary judgment as to this claim.

Petitioner next asserts that the trial court erred by failing to instruct the jury that it could sentence her to life imprisonment even if it sentenced Porterfield to death. A review of the record indicates that Petitioner failed to raise this claim in the state courts. Moreover, she did not adopt by reference any portion of Porterfield's brief which raised this issue. Petitioner has not established cause to overcome her default. Accordingly, the claim is defaulted because Petitioner failed to exhaust her state remedies and is now barred by the Tennessee post-conviction statute from doing so. The Court therefore grants Respondent's motion for summary judgment as to this claim.

Owens further contends that the trial court violated the Constitution by instructing the jury that it should not let sympathy affect its judgment. Respondent asserts that this claim was procedurally defaulted because it was not presented in the state courts. Petitioner relies on Porterfield's appellate brief to establish that she exhausted this issue in the state courts. She did adopt by reference parts of Porterfield's brief, however, Issue XVIII pertaining to the "sympathy" jury instruction was not adopted by Petitioner. *See* Addendum 8 at 36-37. Furthermore, the Tennessee Supreme Court discussed the "sympathy" jury instruction issue in reference to Porterfield's claim. *See Porterfield*, 746 S.W.2d at 450. The Court concludes therefore that Petitioner failed

to exhaust this claim in the state court proceedings and is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting this claim. Petitioner has procedurally defaulted this issue, and the Court may not consider its merits on habeas review. Accordingly, the Court grants Respondent's motion for summary judgment as to the trial court's "sympathy" jury instruction in Claim 18.

Petitioner next insists that the trial court erred by failing to instruct the jury that it was to presume that a life sentence meant a life imprisonment after a prospective juror stated in group voir dire that a life sentence did not result in such imprisonment. Respondent maintains that Petitioner procedurally defaulted this claim. Relying on her post-conviction briefs, Petitioner argues that she exhausted this claim in the state courts. Specifically, she maintains that portions of these briefs, which assert that "jurors hold misconceptions about the imposition of the death penalty, including the mistaken belief that a person sentenced to a life prison term does not spend the rest of her life in prison," resulted in the exhaustion of this claim. *See* Addendum 14 at 87; Addendum 18 at 99.

The Court concludes that Petitioner did not exhaust this claim in the state courts. The context in which this argument was presented to the state courts indicates that Petitioner was challenging her inability to present proof regarding parole eligibility and challenging the constitutionality of the death

penalty in general based on certain juror misconceptions. *See* Addendum 14 at 86-90; Addendum 18 at 98-100. Furthermore, when addressing Petitioner's argument concerning parole eligibility for a sentence of life imprisonment, the court of criminal appeals discussed it in relationship to the constitutionality of the death penalty. *See Owens*, 13 S.W.3d at 765-66. Petitioner did not assert that the trial court erred by failing to instruct the jury that it was to presume that a life sentence would result in a lifetime of imprisonment. Accordingly, the Court finds that Petitioner failed to exhaust this claim in the state courts and is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting it. She has procedurally defaulted this claim, and the Court may not consider its merits on habeas review. The Court therefore grants Respondent's motion for summary judgment as to Petitioner's claim that the trial court erred by failing to instruct the jury as to parole eligibility for those sentenced to life.

T. Claim 20 – The Tennessee Supreme Court Violated The Sixth, Eighth, And Fourteenth Amendments By Conducting A Proportionality Review With An Incomplete Rule 12 Form

Petitioner asserts that the Tennessee Supreme Court relied on an incomplete Rule 12 report to conduct its proportionality review in violation of the Constitution. Petitioner admits that she failed to

raise this issue during post-conviction proceedings. *See* Traverse at 8. The Court concludes that Petitioner did not exhaust this claim in the state courts and is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting it. Therefore, Petitioner has procedurally defaulted this contention, and the Court may not consider its merits on habeas review. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 20.

U. Claim 21 – The Process That Resulted In Petitioner's Death Sentence Violated The Sixth, Eighth, And Fourteenth Amendment

Owens claims that the proportionality review conducted by the Tennessee Supreme Court was inadequate. Petitioner admits that she did not present evidence concerning the alleged inadequacy of the proportionality review during post-conviction proceedings. The Court concludes therefore that she failed to exhaust this claim in the state courts and is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting this claim. Petitioner has procedurally defaulted this claim, and the Court may not consider its merits on habeas review. Accordingly, the Court grants Respondent's motion for summary judgment as to Claim 21, ¶ 178.

V. Claim 22 – Petitioner's Death Sentence Violates The Eighth And Fourteenth Amendments

Petitioner asserts that her death sentence violates the Eighth and Fourteenth Amendments because it is the product of Porterfield's decision not to plead guilty, a process over which Owens had no control. As noted *supra*, the State offered Petitioner and Porterfield life sentences in return for pleas of guilty. The State's offer, however, was contingent upon both defendants pleading guilty. Respondent maintains that Petitioner has procedurally defaulted this claim because the only issue that Petitioner raised in the state courts concerning her inability to plead guilty was related to the trial court's failure to grant a severance motion.

To establish that she did not procedurally default the claim, Petitioner relies on her direct appeal brief which provides in pertinent part that

> *simple due process* dictates that in a capital case when a situation arises as in the instant case, that a co-defendant be allowed to be severed and accept a life sentence. If not, such failure to sever allows a co-defendant to dictate whether or not another co-defendant may be exposed to the ultimate punishment. Such procedure, appellant respectfully submits, violates *due process of law*.

Addendum 7 at 8 (emphasis added).[20] Petitioner asserts that by using the term "due process," she raised a claim of a violation of the Fourteenth Amendment. Furthermore, she argues that her usage of the phrase "simple due process . . . in a capital case" implied a claim based on the Eighth and Fourteenth Amendments. In conclusion, Petitioner contends that she asserted a violation of the Eighth Amendment by arguing that the trial court erred in failing to grant a severance resulting in her inability to accept the State's plea offer, which in turn, allowed Porterfield to dictate whether she would be exposed to a sentence of death.

The Court must determine whether this excerpt of Petitioner's direct appeal brief "fairly presented" to the state courts the substance of Petitioner's Eighth and Fourteenth Amendment claims related to Porterfield's decision to proceed to trial. A federal claim is not "fairly presented" simply because all the facts necessary to support it were presented to the state court or because the constitutional claim appears self-evident. *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1054 (6th Cir. 1983).

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[20] The issue, as styled in Petitioner's direct appeal brief, was "THE COURT A [sic] ERRED IN REFUSING TO SEVER THE APPELLANT FROM THE CO-DEFENDANT'S CASE AND ALLOWING HER TO PLEAD GUILTY AND ACCEPT A LIFE SENTENCE." Addendum 7 at 6. The brief continues to discuss how the proof elicited in Porterfield's case had a prejudicial "spill over" effect on Petitioner's case resulting in the imposition of the death penalty. *Id.* at 7-8.

Instead, the petitioner must have asserted both the factual and legal basis for her claim to the state courts. *Franklin v. Rose*, 811 F.2d 322, 325 (6th Cir. 1987). A state defendant may be deemed to have "fairly presented" a claim to the state courts, if she (1) relied upon federal cases employing constitutional analysis; (2) relied upon state cases employing federal constitutional analysis in like fact situations; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law. *Id.* at 326. "General allegations of the denial of rights to a 'fair trial' and 'due process' do not 'fairly present' claims that specific constitutional rights were violated." *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000) (citing *Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2d Cir. 1984)).

Applying the *Franklin* criteria, the Court finds that Petitioner did not sufficiently assert a claim of a violation of the Eighth and Fourteenth Amendments based on the arbitrary imposition of the death penalty on Petitioner in light of Porterfield's decision not to plead guilty. First, Petitioner did not rely upon federal cases employing constitutional analysis of the Eighth or Fourteenth Amendments in support of her claim. The only decisions cited by Petitioner in support of her claim were state law cases. *See* Addendum 7 at 7 (citing *Seaton v. State*, 472 S.W.2d 905 (Tenn. Crim. App. 1971); *Arrington v. State*, 543 S.W.2d 314 (Tenn. Crim. App. 1976)). Moreover, the

state law cases listed by Petitioner simply discuss the propriety of severance and of granting a severance to force a plea. Furthermore, the state cases do not employ federal constitutional analysis of the Eighth or Fourteenth Amendments in like fact situations. Petitioner did include in her brief the phrases "due process" and "simple due process . . . in a capital case" in the concluding paragraph discussing Petitioner's claim of error. Although these are constitutional law phrases, a general reference like "due process" alone does not "fairly present" a claim that specific constitutional rights were violated. Likewise, the brief excerpt is not sufficiently particular to allege a denial of a specific constitutional right. The discussion is couched in terms of the trial court's failure to grant a severance, not in terms of the arbitrariness of the death penalty based on Porterfield's decision.

Finally, the claim does not allege facts well within the mainstream of constitutional law. Courts have long recognized that the Eighth Amendment requires that a sentence of death must not be given arbitrarily or capriciously. *See Furman v. Georgia*, 408 U.S. 238 (1972). A defendant's inability to make a plea based on a co-defendant's decision not to make such plea, however, cannot be said to be facts found within the mainstream of Eighth Amendment's requirement that a sentence of death not be arbitrary. This is especially true when, as here, the facts and argument centered around the trial court's alleged errors in failing to sever Petitioner's case from Porterfield's and in denying her request that the

State in effect be required to accept Petitioner's plea of guilty.

The Court concludes therefore that Petitioner failed to provide the legal basis for her claim to the state courts. As such, the Court finds that Petitioner failed to exhaust this claim in the state courts and is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting this claim. Accordingly, Petitioner has procedurally defaulted this issue, and the Court may not consider its merits on habeas review.[21] Respondent's motion for summary judgment of Claim 22 is granted.

W. Claim 23 – The Tennessee Death Penalty Statute And The Death Penalty Itself Violate The Eighth And Fourteenth Amendments

Petitioner advances three arguments in favor of her claims that the Tennessee Death Penalty Statute and the death penalty itself are unconstitutional. The Court will consider each argument in turn. First, she

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[21] The Court notes that absent a finding that Petitioner procedurally defaulted Claim 22, Petitioner's claim likely would not have prevailed because a federal habeas court generally may not announce and grant retroactive application to new rules of constitutional criminal procedure. *E.g., Saffle v. Parks*, 494 U.S. 484 (1990); *Teague v. Lane*, 489 U.S. 288 (1989). The State did not raise the *Teague* argument, however, and this Court is not required to consider it *sua sponte*. *Lyons v. Stovall*, 188 F.3d 327, 338-39 (6th Cir. 1999).

asserts that the Tennessee Death Penalty Statute unconstitutionally precludes the sentencing jury from knowing that a non-unanimous verdict results in a life sentence. On post-conviction, the state court determined that the Tennessee Supreme Court has routinely rejected this claim. *See Owens*, 13 S.W.3d at 766 (citing *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993) (holding that the Constitution does not prohibit or require a trial court to inform a capital sentencing jury of relevant and accurate sentencing information)).

In *Jones*, 527 U.S. 373, the Supreme Court has held that the Constitution does not require that a jury in every capital case be instructed as to the consequences of a breakdown in the deliberative process. *Jones*, 527 U.S. at 382-83. Accordingly, the state court's decision that the Tennessee Death Penalty Statute is not unconstitutional because the jury is prevented from knowing that a non-unanimous verdict results in a sentence of life is neither contrary to nor an unreasonable application of federal law.

Petitioner next contends that the death penalty is unconstitutional because 1) it cannot be applied with consistency, given that the Constitution requires individualized sentencing, and 2) the prosecution cannot establish that a sentence of death is the least intrusive means of accomplishing a compelling State interest.

Petitioner failed to present these claims to the state courts. She maintains that ineffective assistance of counsel provides cause sufficient to excuse the procedural default. In order to utilize a claim of ineffective assistance of counsel to establish cause, the claim of ineffective assistance itself must have been exhausted in the state courts. *See Edwards*, 529 U.S. at 452-53. Petitioner did not present the state courts with a claim of ineffective assistance of counsel based on counsel's failure to raise and perfect on appeal these arguments related to the constitutionality of the death penalty. Petitioner therefore has not established cause to overcome her failure to exhaust her state remedies. As such, this Court may not review the procedurally defaulted claim. The Court thereby grants Respondent's motion for summary judgment of Claim 23.

X. Claim 24 – Petitioner Received Ineffective Assistance Of Counsel In Violation Of The Sixth, Eighth, And Fourteenth Amendments

Petitioner asserts that she received ineffective assistance of counsel based on counsel's failure to assert at trial or on appeal that 1) sex discrimination occurred in the selection of the grand jury foreperson, 2) under representation of African-Americans on the panels from which prospective jurors were drawn resulted from discrimination against African-Americans, 3) the prosecution used its peremptory challenges in a discriminatory manner, 4) the decisions of the trial

court to strike for cause prospective juror Dorothy A. Newberry and not to strike for cause Rhea E. Benson and Richard F. Piersing were unconstitutional, and 5) the prosecution improperly stated to the jury that it was the duty of the defense to present mitigating evidence and that the death penalty is a deterrent. Respondent maintains that Petitioner procedurally defaulted these claims.

None of Owens' allegations of ineffective assistance of counsel include any of the grounds advanced by Petitioner in Claim 24 of her habeas petition. Accordingly, the Court finds that Petitioner failed to exhaust this claim in the state courts and is now barred by Tennessee's post-conviction statute of limitations and waiver provisions from asserting it. The claim is therefore procedurally defaulted, and the Court may not consider its merits on habeas review. The Court thereby grants Respondent's motion for summary judgment of Claim 24.

Y. Claim 25 – Petitioner's Conviction Violates The Sixth, Eighth, And Fourteenth Amendments Should It Be Determined That Porterfield Did Not Murder Mr. Owens Or That Porterfield's Conviction Is Unconstitutional

Petitioner asserts that if the district court concludes that Porterfield did not kill Mr. Owens or that Porterfield's conviction is unconstitutional, an essential element of the crime for which Petitioner was convicted would be negated. Petitioner failed to

exhaust this claim in the state courts and is now barred from presenting the claim by Tennessee's post-conviction statute of limitations and waiver provisions. The contention is therefore procedurally defaulted, and the Court may not consider its merits on habeas review. The Court thereby grants Respondent's motion for summary judgment of Claim 25.

Z. Claim 26 – The Cumulative Effect Of Constitutional Error Is Not Harmless Should The Court Find More Than One Constitutional Error Harmless

Owens claims that, should this Court determine that there are two or more Constitutional errors which are harmless, the cumulative effect of such errors results in Constitutional error warranting the grant of writ. Petitioner failed to assert a claim of the cumulative effect of error in the state court proceedings. Accordingly, Petitioner did not exhaust this claim in the state courts and its consideration is now barred by Tennessee's post-conviction statute of limitations and waiver provisions. The claim is therefore procedurally defaulted, and the Court may not consider its merits on habeas review. The Court thereby grants Respondent's motion for summary judgment of Claim 26.

V. CONCLUSION

For the reasons stated herein, the Court hereby grants Respondent's motion for summary judgment as to Claims 1-18; 20; 21, ¶ 178; and 22-26. Respondent's and Petitioner's motions for summary judgment concerning Claims 19 and 21, ¶ 177, were addressed in a prior order. *See Owens* Order I.

IT IS SO ORDERED this 23rd day of June, 2005.

/s/ J. Daniel Breen
J. DANIEL BREEN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

GAILE K. OWENS, Petitioner,	)	
v.	)	No. **2:00-2765**-Br
EARLINE GUIDA, WARDEN, Tennessee Prison For Women, Respondent.	)	

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

(Filed Aug. 30, 2005)

This matter is before the Court pursuant to Petitioner Gaile Owens' Rule 59, Fed. R. Civ. P., motion to alter or amend this Court's prior judgment denying her habeas relief on various claims that her constitutional rights were violated in the conviction and sentence of death for her role in the murder of her husband, Ronald Owens. Petitioner asserts two grounds in support of her motion: 1) that the Court erred in granting summary judgment for the Respondent, Warden Earline Guida, on Petitioner's claim that her due process rights, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), were violated by the prosecution's failure to disclose certain cards and notes in its possession evidencing an affair between

the victim and his mistress, Gala Scott; and 2) that the Court erred in its prior finding that Petitioner had procedurally defaulted on the claim that her death sentence was unconstitutional because her agreement to plead guilty in exchange for a life sentence was thwarted by her co-defendant.

A motion pursuant to Rule 59 is not an opportunity to relitigate a case. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Rather, a motion to alter or amend judgment should be granted only if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent a manifest injustice. *GenCorp, Inc. v. American Intern. Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted). Proceeding under these standards, the Court will evaluate each of Petitioner's arguments in turn.

I. THE COURT ERRED IN DENYING RELIEF ON PETITIONER'S *BRADY* CLAIM

Owens claims that the Court erred in denying her habeas relief on her due process claim that the prosecution failed to disclose evidence consisting of letters belonging to the victim that were apparently written by his mistress. In granting summary judgment in favor of the Respondent, the Court ruled that it need not determine whether the suppressed materials were truly exculpatory because Petitioner had failed to show prejudice resulting from the

suppression. *See* Order Granting In Part Respondent's First Motion For Partial Summary Judgment, dkt. no. 78 at 57-58 (June 23, 2005) ("Owens Order II"). The Court held that, because Petitioner and her counsel knew of the victim's extramarital affairs prior to trial, she could have introduced, through the testimony of Gala Scott, evidence of the affair if Owens believed such evidence was truly exculpatory. Accordingly, the Court held that Petitioner had not demonstrated a reasonable probability that her sentence would have been different had the cards and notes been produced.

In her Rule 59 motion, Petitioner's response to the Court's holding is to essentially reassert her general claim that suppression of the letters was unconstitutional because the evidence arguably exculpated her from the death penalty and that Petitioner should not have been made to settle for the testimony of Scott where her letters were in the possession of the prosecution. In support of her claim that the suppression of the materials prejudiced her defense at sentencing, Petitioner cites a number of cases which, she argues, demonstrate that, when one spouse is responsible for the death of the other, proof of infidelity on the part of the deceased spouse has sufficiently mitigated the culpability of the offending spouse such that a sentence of death was not appropriate. The Court finds these cases inapposite. Most of the cited cases deal with killings resulting from sudden and excited passions on the part of the defendant-spouse, usually owing to confrontations

with the victim-spouse while engaged in acts of adultery, confrontations with the paramour of the adulterous spouse, or after heated argument with the spouse.[1] The other cited cases are not clearly analogous to this case.[2] It bears noting that, in the

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[1] *See State v. Thornton*, 730 S.W.2d 309 (Tenn. 1987) (husband who killed wife's paramour provoked by finding wife and paramour engaged in sexual acts at defendant's home); *Whitsett v. State*, 299 S.W.2d 2, 6 (Tenn. 1957) (defendant happened upon wife's lover by chance and thereafter pursued and shot victim while acting under "intense and adequately provoked passion"); *Drye v. State*, 184 S.W.2d 10 (Tenn. 1944) (defendant, who searched for and killed wife after she told him in a phone conversation that she would date anyone she pleased, was acting under sufficiently provoked passion triggered by the phone call); *State v. Belcher*, 2001 WL 1191392 (Tenn. Crim. App. 2001) (defendant learned of affair and shortly thereafter was confronted by spouse and spouse's lover, and argument among the three precipitated the killing of the spouse's lover); and *People v. Buggs*, 493 N.E.2d 332, 336-337 (Ill. 1986) (defendant's death sentence for murder of wife vacated because it was mitigated by significant provocation where murder occurred in a rage due to argument with spouse which included the revelation that defendant was not the father of the family's children).

[2] The mere fact that there have been spouses who have not received the death penalty for the killings they perpetrated does not advance Petitioner's argument. In one cited case, *State v. Reagan*, 2004 WL 1114588, pgs. 8-10 (Tenn. Crim. App. 2004), the court upheld defendant's conviction for first-degree premeditated murder and in no way discussed any mitigation of defendant's culpability based on defendant's suspicion that his wife was committing adultery. In another case, *State v. McCarver*, 2003 WL 22087476, pgs. 17-20 (Tenn. Crim. App. 2003), the prosecution opted not to seek the death penalty against the defendant, for reasons not in the record, and the court again upheld the defendant's conviction for first-degree

(Continued on following page)

cited *Thornton* case, the Tennessee Supreme Court set aside the defendant's first-degree murder conviction in favor of a voluntary manslaughter conviction because "the necessary elements of malice and premeditation were not demonstrated" by the defendant's actions in shooting his wife's paramour while the couple were engaged in sex. *Thornton*, 730 S.W.2d at 315. It is uncontested that Petitioner acted with malice and premeditation in procuring her husband's murder. Indeed, none of the cases cited by Petitioner as examples lending support to her claim that her husband's infidelity should mitigate her punishment are reflective of the protracted deliberation and repeated effort exhibited by the Petitioner in soliciting her husband's murder. The extent of Petitioner's premeditation and her concerted efforts over a period of months to solicit the eventual killer, as well as helping to plan the actual murder, remove her from the class of cases where the death penalty has been held inappropriate due to the killer's visceral emotional reaction to a spouse's infidelity. Petitioner's case is therefore more closely analogized to cases where a spouse has received the death

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premeditated murder. Finally, in *People v. Carlson*, 404 N.E.2d 233, 244-245 (Ill. 1980), the defendant's death sentence for murdering a police officer, purportedly while attempting to commit suicide, was vacated because defendant was acting under extreme emotional disturbance due to the failure of his marriage, and, importantly, the trial court had improperly refused to consider in mitigation the defendant's clean criminal record prior to the murder.

penalty for his or her role in a murder-for-hire scheme resulting in the death of their spouse.[3]

Petitioner asserts that the letters and cards suppressed by the prosecution are sexually explicit and that they would have "sickened" the jury because they "conclusively proved the reason for Gaile Owens' actions." Motion to Alter or Amend Judgment, *Owens v. Guida*, No. 00-2765, dkt. no. 81 at 4-5. In her habeas petition, Owens notes that the police who discovered the writings described them as "juvenilistic love notes." Though Petitioner would have the Court believe that the notes are so powerfully exculpatory as to punishment that a juror would find the evidence sufficient to mitigate the compelling proof supporting the aggravating factors found by the jury, she only describes the letters to the extent of referring to "pet names" Scott used in composing the cards and notes. It defies reason to suggest that Petitioner would have her husband killed due to his infidelity, and then abandon presenting any evidence of the adultery in mitigation of her punishment, even without the victim's love letters from his mistress. Nonetheless, with the proof presented against Owens at trial, Petitioner has not shown that, had the notes been disclosed to her prior to trial, there was a reasonable probability that her sentence would have been different, or that the

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[3] *See, e.g., State v. Stephenson*, 2005 WL 551938 (Tenn. Crim. App. 2005) and *State v. Stephens*, 78 S.W.3d 817 (Tenn. 2002) among others.

suppression of the cards and notes "undermine[d] confidence in the outcome of the trial." *U.S. v. Bagley*, 473 U.S. 667, 678 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Accordingly, Petitioner has failed to establish that this Court erred in its previous ruling that she suffered no prejudice due to the suppression of the letters, as is required in obtaining relief on a *Brady* claim. *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999).

II. THE COURT ERRED IN FINDING PETITIONER HAD PROCEDURALLY DEFAULTED ON HER CLAIM THAT HER SENTENCE WAS UNCONSTITUTIONAL BECAUSE PETITIONER'S AGREEMENT TO PLEAD TO A LIFE SENTENCE WAS THWARTED BY HER CO-DEFENDANT

Owens claims that her death sentence was arbitrary, and thus violated the Eighth and Fourteenth Amendments, because she was forced to go to trial due to her co-defendant's rejection of a plea agreement which she desired to accept. Thus, she argues, because her "death sentence is a product of something over which she had no control, it is arbitrary." Response to Respondent's Motion for Summary Judgment, *Owens v. Guida*, no. 00-2765, dkt. no. 47 at 67. The Court granted Respondent's motion for summary judgment because the Petitioner had procedurally defaulted the claim by not fairly presenting it in state court proceedings. *See* Owens Order II, dkt. no. 78 at 108-112. In her motion to alter

or amend, Petitioner asserts two errors by the Court in its finding of procedural default. First, Petitioner claims that this Court's holding cannot be reconciled with its previous determination regarding the effect of the Sixth Circuit's decision in *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004), which held that the Tennessee Supreme Court implicitly considers, in its statutory mandatory review process, any claim that a sentence of death was imposed arbitrarily. Second, Owens maintains that she did fairly present her claim in the state courts because, in arguing on direct appeal that the trial court should have granted a motion to sever her case from her co-defendant's, her appellate brief relied on a state case which cited *Brady v. United States*, 397 U.S. 742 (1970). The Court will address each of Petitioner's allegations of error in turn.

A. THE EFFECT OF *CONE* ON PETITIONER'S ARBITRARINESS CLAIM

As noted above, in *Cone* the Sixth Circuit held that the Tennessee Supreme Court is required to review all death sentences for arbitrary imposition, and, therefore, the state court implicitly reviews claims related to such arbitrary imposition whether or not they are actually presented on appeal. *Cone*, 359 F.3d at 791-794. Though *Cone* was reversed on appeal, *see Bell v. Cone*, 125 S.Ct. 847 (2005) (per curiam), the Supreme Court did not address the Sixth Circuit's holding regarding implicit review, instead deciding that the Sixth Circuit was incorrect in finding that the Tennessee Supreme Court failed to

apply a constitutional narrowing construction to the aggravating factor which Cone claimed was unconstitutionally vague and therefore led to arbitrary imposition of his death sentence. *Id.* at 853-54. Given the Supreme Court's decision not to address the Sixth Circuit's implicit review theory, this Court held that the doctrine likely survived the reversal in *Cone* and remains in effect. *See* Order Granting in Part Respondent's First Motion for Partial Summary Judgment and Denying Petitioner's Motion for Summary Judgment ("Owens Order I"), dkt. no. 77 at 7. Thus, the question is whether the Tennessee Supreme Court implicitly reviewed Petitioner's claim that her death sentence was arbitrarily imposed because she was denied a conditional plea to a life sentence when her co-defendant opted to proceed with trial rather than accept the plea agreement.

The Sixth Circuit's decision in *Cone* cannot be construed to reach this contention by Petitioner because, while couched in terms of arbitrariness, the claim has less to do with arbitrary imposition of the death penalty than it does with the state's exercise of well established prosecutorial prerogatives. Petitioner cites no authority for her assertion that the prosecution's decision to condition her plea on acceptance of the plea by her co-defendant constitutes arbitrary imposition of the death penalty. Rather, she only mentioned *Furman v. Georgia*, 408 U.S. 238 (1972) and *Woodson v. North Carolina*, 428 U.S. 280 (1976), for the general proposition that the Constitution requires that "capital sentencing must, as much as

humanly possible, eliminate arbitrariness from the imposition of the death penalty." R. 47 at 67. However, the Constitution's prohibition on arbitrary or capricious imposition of the death penalty is directed primarily at the unbridled exercise of discretion by the sentencing authority. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court explained that *Furman* was implicated when a specific person has been convicted of a capital offense:

> *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Id. at 199. In *Gregg*, the Court rejected the claim that a prosecutor's "unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with" violated *Furman*'s prohibition on arbitrary imposition of a death sentence. *Id. Gregg* specified that "the decision to impose" the death sentence must be guided by standards to avoid arbitrariness; here, the prosecution's decision to offer a plea to Petitioner contingent on her co-defendant's acceptance of the same offer cannot be characterized as a decision to impose the death penalty. That determination was reached unanimously by a jury after due consideration of aggravating and mitigating evidence presented at her

sentencing hearing. Because *Cone* was concerned with the possible abuse of the sentencing authority's power due to the jury's consideration of vague instructions, the Sixth Circuit was careful to recognize this distinction in its discussion of the circumscription of the implicit review doctrine:

> [T]he implicit review doctrine, as we apply it today in this case, does not foreclose the possibility that other death penalty defendants may procedurally default on other constitutional issues not raised on direct appeal. The language of Tennessee's mandatory review statute provides a basis to distinguish between vagueness challenges and other constitutional claims, since it requires the Tennessee Supreme Court to look specifically for sentences "imposed in any arbitrary fashion."

Cone, 359 F.3d at 793. Accordingly, because the prosecution's decision to offer a conditional plea agreement to Petitioner is not a "decision to impose" a death sentence, any perceived constitutional violation inherent in that decision is not saved from procedural default under the limited reach of the implicit review doctrine adopted by the Sixth Circuit in *Cone*.

B. FAIR PRESENTATION OF THE CLAIM IN THE STATE COURTS

Petitioner asserts that this Court erred in holding that she had not fairly presented to the state courts her constitutional claim regarding her inability

to plea. Owens insists that, while on direct appeal, not only did she argue that due process in a capital case required that the trial court sever her case from her co-defendant's so that she could accept a plea agreement, but she also cited *Seaton v. State*, 472 S.W.2d 905 (Tenn. Cr. App. 1971), a state case which included a citation to *Brady v. United States*, 397 U.S. 742 (1970). Thus, Petitioner argues, her constitutional claim was fairly presented on appeal such that the state court should have been aware of the federal nature of the claim. In support of this argument, Owens relies on *Baldwin v. Reese*, 541 U.S. 27 (2004), in which the Supreme Court found that the habeas petitioner had not fairly presented his constitutional claim of ineffective assistance of appellate counsel in state court, in part because the state petition "provid[ed] no citation of any case that might have alerted the court to the alleged federal nature of the claim." *Id.* at 33. This Court has already held that Petitioner's mere invocation of general concepts like due process does not alone suffice to fairly present an alleged federal claim in the state courts. *See* Owens Order II at 109-11. Thus, the issue presented in this motion to alter or amend is whether Petitioner's citation, in her brief on direct appeal, of a state case, which included a reference to a federal court opinion, was sufficient to have alerted the state courts to the federal nature of the claim she now seeks to assert in habeas review.

Mere citation to *Seaton* on direct appeal could not have fairly warned the state court that it was

considering a federal constitutional claim based on the prosecution's decision to condition Petitioner's plea agreement on the acceptance of the agreement by her co-defendant. First, the citation to *Seaton* in Petitioner's appellate brief was not in the context of presenting any legal analysis favoring Petitioner's argument that the severance should have been granted. Indeed, *Seaton* expressly disfavors granting Petitioner's motion for severance. Rather, the citation was given in recounting the general arguments of the parties at the time the motion was made. *See* Addendum 7 at 7. Second, despite the citation to *Brady v. United States* in *Seaton*, the Tennessee appellate decision deals exclusively with state law regarding a trial judge's considerations in deciding whether to grant a severance motion. *Brady v. United States* is cited in *Seaton* only in support of the state court's observation that "plea bargaining is a valuable tool in expediting the administration of criminal justice and should be encouraged by the courts in proper instances." *Seaton*, 472 S.W.2d at 906. Because the citation to the federal case occurs only in the context of supporting a general policy favored by the courts, and is in no way integral to the analysis or holding of the case, the reference to *Brady* was clearly in dicta. Given all of the above, such citation of a federal case in Petitioner's appellate brief is far too attenuated to have alerted the state court to any alleged federal nature of the claim it was evaluating.

In sum, the claim on appeal was whether the trial court erred in refusing to grant Petitioner's

severance motion. The state appellate court could not have known it was considering a federal claim that a death sentence was imposed arbitrarily because of a co-defendant's refusal of a conditional plea agreement. This is made even more apparent because the state case was referenced only in the context of recounting arguments of the parties at the time the severance motion was made, and not as part of the substantive legal argument advanced in the appellate brief. Accordingly, Petitioner's argument that the Court erred in finding this claim procedurally defaulted because she failed to fairly present the claim in the state courts is without merit.

III. CONCLUSION

For all of the reasons given above, the Court DENIES Petitioner's motion to alter or amend.

IT IS SO ORDERED this 30th day of August, 2005.

/s/ J. Daniel Breen
J. DANIEL BREEN
UNITED STATES
DISTRICT JUDGE

No. 05-6105

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GAILE K. OWENS, Petitioner-Appellant, v. EARLINE GUIDA, WARDEN, Respondent-Appellee.	)	ORDER (Filed Feb. 25, 2009)

BEFORE: BOGGS, Chief Judge; MERRITT and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the

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Judge Gibbons recused herself from participation in this ruling.

petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk